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The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives

Richard D. Lamm

Steven A.G. Davison

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THE LEGAL CONTROL OF POPULATION GROWTH AND DISTRIBUTION IN A QUALITY ENVIRONMENT: THE LAND USE ALTERNATIVES

BY RICHARD D. LAMM* AND STEVEN A.G. DAVISON**

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* Associate Professor of Law, University of Denver College of Law; Representative, Colorado General Assembly.

** Member, Colorado Bar; B.S. 1968, Cornell University; J.D. 1971, Yale Law School.

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INTRODUCTION

WHEN Thomas Jefferson spoke of King George III with these words in the Declaration of Independence he bespoke an ethic of freedom of growth that became one of our society's most basic tenets:

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of land.

Growth, and the inherent goodness to it, is more than a philosophy; it is a theology. "Watch Us Grow" is the proud hope on the first sign we see at Averagetown, U.S.A. Towns, counties, and states have historically competed with each other to attract new business and new residents with the unquestioned assumption that to be bigger is to be better.

Suddenly there has been a startling reversal of this long-standing assumption. Based on a survey taken for them by the Opinion Research Corporation, the Rockefeller Commission on Population Growth and the American Future has reported:

fifty-four percent of Americans think that the distribution of population is a "serious problem;" half believe that, over the next 30 years, it will be at least as great a problem as population growth.¹

There have been efforts in state legislatures to study the efficacy

¹ REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE 44 (Signet ed. 1972).

of the "growth-is-good" ethic.² Some states have passed resolutions calling for population stabilization.³ Legislation has been passed in some states which would discourage growth in certain locations.⁴ States which have long had legislation and promotional agencies encouraging industrial and population growth are changing those policies.⁵ At least two governors are discouraging some forms of growth.⁶ Citizen-initiated referenda seeking to stabilize their political subdivisions' populations have been introduced.⁷ Thirty-six U.S. Senators have introduced a joint resolution calling for an early stabilization of the U.S. population.⁸

The new skepticism about growth has been stated by the California Environmental Quality Study Council:

We simply have to slow down our growth and stabilize the population of our regions according to their carrying capacities. This may be hard to accomplish, for growth has served us well in this country since its beginnings. But the harsh reality is that unrestrained growth and environmental quality have become incompatible.⁹

The Colorado Environmental Commission, in even stronger language, has warned: "Colorado's future is threatened by overpopulation."¹⁰ The Commission, speaking of rapid population growth, said:

² See S. Bill No. 155, Florida Legis., 1972 Sess. (introduced Feb. 1, 1972). Senator Knopke presented this bill to create a commission to investigate the impact of population growth; referred to Florida Senate Ways and Means Comm. on Feb. 2, 1972. See H. Bill No. 734, Hawaii Legis., 1972 Sess. (introduced Feb. 18, 1971); H. Bill No. 1322, Hawaii Legis., 1972 Sess. (introduced Mar. 10, 1971). These bills were presented to create a permanent commission on population stabilization which would have, among its purposes, the determination of an optimum population distribution within the state. See S. Res. No. 355, Hawaii Legis., 1970 Sess. wherein a temporary commission on population stabilization was created. This commission's report was made public in January 1972.

³ See Assembly Res. No. 110, Cal. Legis., 1971 Sess.; J. Res. No. 14, N.M. Legis., 1971 Sess.

⁴ ME. REV. STAT. ANN. tit. 12, §§ 683 *et seq.* (Supp. 1972); VT. STAT. ANN. tit. 10, §§ 6001 *et seq.* (Supp. 1971).

⁵ See S. Bill No. 51, Colo. Legis., 1971 2d Sess. (introduced Feb. 29, 1972) which changes the policy of the Department of Commerce and Development to emphasize the development of "rural" Colorado. See also the emphasis on "balance" rather than "growth" contained in the various state environmental policy acts; e.g., ch. 109, [1971] Wash. Laws 623.

For a compilation and analysis of state environmental policy acts, see COUNCIL OF ENVIRONMENTAL QUALITY, 102 MONITOR, July 1971; *id.* May 1972.

⁶ Gov. Tom McCall, Ore.; Gov. Russell Patterson, Del., as quoted in FORBES, June 15, 1971, at 22.

⁷ Denver Post, Nov. 1, 1971, at 18, cols. 1-2.

⁸ S.J. Res. 108, 92d Cong., 1st Sess. (1971).

⁹ CALIFORNIA ENVIRONMENTAL QUALITY STUDY COUNCIL (1971) *cited in* SPECIAL REPORT ON THE COMPREHENSIVE OPEN SPACE PLAN, SHAPING THE FUTURE OF HAWAII'S ENVIRONMENT 1 (Jan. 1972).

¹⁰ FINAL REPORT OF THE COLORADO ENVIRONMENTAL COMMISSION, COLORADO: OPTIONS FOR THE FUTURE 5 (MAR. 1972).

[It] will place strains on our human and natural resources unlike anything we have ever experienced before in Colorado. We are totally unprepared for this kind of an onslaught. Our lack of preparation can only lead to chaotic conditions.¹¹

Colorado is urged by this Environmental Commission to adopt a policy of population stabilization and rural development to reverse the current maldistribution of population.¹²

There is a growing awareness that our urban and rural crises are directly related to population maldistribution and that methods which would direct growth from urban to rural areas would help to alleviate both crises. President Nixon implied this relationship in his first State of the Union Address where he stated, "The result is exemplified in the vast area of rural America emptying out of people and of promise—a third of our counties lost population in the sixties."¹³ President Johnson similarly stated:

The cities will never solve their problems unless we solve the problems of the towns and smaller areas.

So consider the problem of urban growth. If the present trend continues, by 1985 as many people will be crowded into our cities as occupy the entire Nation today—in 1960. That means people enough to make five more New Yorks, or that means people to make 25 more Washingtons.

Many will migrate to the cities against their will, if we continue to allow this to happen.¹⁴

Should this prediction prove true the implications for the quality of life in our cities are not pleasant. The sense of community loss entailed in this growth pattern has been identified as two problems apart from overpopulation and technological change by Philip Hauser.¹⁵ Population displosion and population implosion must be addressed as crises equal to the population explosion to find a truly effective solution. Displosion is the uneasy jamming of ethnic groups thrown together into small areas of urban space, dealing with each other in situations of continual tension. Implosion is the distributional problem alluded to by Presidents Nixon and Johnson above.

Metropolitan areas until recently have assumed that growth was desirable and that they should compete for a new "tax

¹¹ *Id.* at 37.

¹² *Id.* at 47.

¹³ Pres. Richard M. Nixon, State of the Union Speech, 116 CONG. REC. 738, 740 (1970).

¹⁴ President's Remarks at Ceremonies Marking the 100th Anniversary of Dallastown, Sept. 3, 1966, 2 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1216, 1217 (1966).

¹⁵ P. Hauser, On Population and Environmental Policy and Problems, June 8, 1970 (transcript of talk at First National Congress on Optimum Population and Environment in Chicago, Illinois).

base." There is evidence now that this might not be in the area's best interest, at least in many places. Many of America's large cities are now faced with a deteriorating quality of life, uncontrolled urban sprawl, seemingly insoluble financial problems and possibly irreversible decaying inner-city cores.¹⁶ Additional growth too often exacerbates these ills rather than solving them. There is a growing body of evidence which, while not conclusive, shows that cities beyond a given point experience what economists call "diseconomies of scale" resulting in higher per capita taxes.¹⁷ In every tax category—property, general sales, selective sales—the per capita tax rate increases for cities between 200,000 and 500,000 people when compared with communities of less than 50,000. *All these rates increase again* when comparing the first group with cities of over one million in population.¹⁸ A city will have to spend more money per capita to provide its residents with adequate services in education, highways, public welfare, hospitals, health, fire and police protection, parks and recreation, housing and urban renewal, libraries, and financial administration the larger its population becomes.¹⁹ Those who have studied the relationship of per capita spending and city size have found this relationship to be more than coincidental.²⁰ One student of the problem has stated: ". . . there is also evidence to indicate that increased levels of per capita spending and employment are related, at least in part, to city size."²¹

Policies are needed to reverse the accelerating concentration of people on a small portion of the land, and at the same time reverse the forces which are causing an estimated 500 U.S. counties to actually lose population at this time.²² This need for new policies is pointed out by the National Goals Research Staff, which found:

¹⁶ REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *supra* note 1, at 207.

¹⁷ See generally ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BULL. No. 70-8, SIZE CAN MAKE A DIFFERENCE — A CLOSER LOOK (Sept. 16, 1970).

¹⁸ *Id.* at 13.

¹⁹ *Id.*

²⁰ See Gabler, *Economies and Diseconomies of Scale in Urban Public Sectors* 45 LAND ECON. 425; Watt, *Growth in Malibu*, NATIONAL REPORTER, July 1971, at 8; Kenneth Watt, "A Model of Society," Ford Foundation, New York, 1970. See also COUNCIL OF PLANNING LIBRARIANS, EX. BIBL. No. 169, OPTIMUM CITY-SIZE AND MUNICIPAL EFFICIENCY for a list of over 50 readings addressed to this relationship.

²¹ Gabler, *supra* note 20, at 433.

²² REPORT OF THE NATIONAL GOALS RESEARCH STAFF, TOWARD BALANCED GROWTH: QUANTITY WITH QUALITY 42 (1970).

[T]he choice of no change in public policy would run the high risk of bringing about the kind of future in which the communities of both urban and rural America would further deteriorate. It means that hundreds of American towns will continue to lose young people and economic opportunity; and that the large metropolitan areas, already burdened with social and fiscal problems and characterized by fragmentation of governmental responsibility, may reach a size at which they will become socially intolerable, politically unmanageable, and economically inefficient.²³

This article will suggest that public policy should adopt the alternative suggested by the above study, i.e., that of seeking "a different spatial distribution of the population by means of a decisive public policy."²⁴ To effectuate spatial distribution implies the limitation of growth in certain areas, the inducement of growth in others. There is a myriad of available land use controls and alternatives to more closely approach these goals. Among these controls are those that are available at the local, intrastate, regional, state, and federal levels of government. We seek to survey these land use controls and to suggest at what governmental level they may be best exercised. Our focus is the range of methods that might be adopted to control growth, encourage population dispersal, and preserve open space.

I. LOCAL LAND USE ALTERNATIVES

Traditionally, the sphere of local governmental responsibility has encompassed the areas of subdivision exactment and regulation, zoning, and open space preservation. Where states continue to allow local autonomy, local governments can use these methods to afford environmental protection to land resources, preserve open space, and thereby affect growth while encouraging population dispersion. In addition, local governments can exploit entirely new spheres of control and new methods of control within these traditional spheres. The choices available to the local government are discussed below. To the extent that these programs are implemented, state governments should exercise supervisory power to insure minimum standards of environmental protection for the state's land resources.

A. *Growth Moratoriums*

Although a growing number of communities have initiated the search for "optimum size," and despite the fact that the "optimum size" question has become a much-discussed con-

²³ *Id.* at 54.

²⁴ *Id.* at 53.

cept,²⁵ there is little ongoing research into this question. Some states²⁶ and municipalities²⁷ have actually investigated "optimizing" types of land use planning, including a number of communities which have declared moratoriums in both zoning changes and in the issuance of building permits.²⁸ The city of Boulder, Colorado, recently listed a partial catalogue of the techniques available to affect growth rate and to balance qualitative and quantitative aspects of community growth.²⁹ To buy time for the discussion of various policy implications surrounding these techniques, it declared a building moratorium. Fairfax County, Virginia is seeking to limit population growth in housing by strictly controlling linkages to public sewerage—a necessity for high density development—while exploring other methods of control through subdivision limits, zoning, and restricting building permits.³⁰ Dade County, Florida, voters have recently passed a building moratorium ordinance allowing the county commissioners to declare a halt in certain areas while environmental studies are made.³¹ These methods should be evaluated in light of the developing law concerning "exclusionary zoning."³²

One traditional method by which local governments have provided open space and parkland for their citizens—thus con-

²⁵ Blayney, *A Clinching Case for Open Space*, CRY CALIFORNIA 3 (Winter, 1971-72): "In any discussion of urban problems today, the desirability of controlling growth is ritually proposed. The idea of limiting population in metropolitan areas has been almost universally accepted as the solution to many of the problems that now confront our major population centers."

²⁶ YEARBOOK OF AGRICULTURE 20 (1972).

²⁷ HOUSE AND HOME, May 1972, at 28.

²⁸ *Id.*

²⁹ See memorandum of June 3, 1971 from the Boulder City Administration to the Boulder City Council, which outlined some of the city's choices: Reevaluation of present zoning standards and densities, reexamination of areas presently zoned industrial, identification of community costs from new development as reflected in fee schedules, a fresh look at user rates and charges, reassessment of taxes and assessment policies on vacant ground in the Boulder Valley, a review of the city's position with respect to annexation and extension of utilities, a restructured real estate transfer tax, the possibility of a land bank policy to purchase development rights to property, an increase in the capability of the greenbelt program to use debt financing and acquisition of land, possible reincorporation of the City of Boulder to include the entire City and County area, and reallocation of existing revenues to acquire properties in harmony with a limited growth policy.

³⁰ Washington Post, Dec. 20, 1971, § B, at 1, col. 4. Recently the mayor of St. Petersburg, Florida, recommended that St. Petersburg be limited to a 300,000 population limit, as that figure would be "the ultimate growth figure for planning purposes." He stated that zoning would not necessarily be the most successful method of growth control and that a city might be forced to refuse sewer and water connections to prevent the city from "outgrowing" the capacity of the two utility systems. St. Petersburg Times, Feb. 12, 1972, at 3, cols. 1-3.

³¹ HOUSE AND HOME, *supra* note 27.

³² See discussion in text p. 9 *infra*.

trolling density—has been to require developers of subdivisions to set aside land for parks or to make payments in lieu thereof.³³

B. Zoning

To stabilize population or reduce the growth rate, cities can also explore zoning regulations which combine minimum lot requirements, limitations on the percentage of a lot which can be occupied by a building, height restrictions on buildings, maximum cubic content limitations, limitations on numbers of rooms per building, and minimum floor area per room. The combination of these restrictions could be expected to limit the population density of a community as it preserves the open space and greenery.

The combination of a minimum lot requirement and limitation on the percentage of a lot which could be occupied by a building insures open space preservation and limits population density. Combining requirements for each individual dwelling unit with height restrictions on a residential dwelling limits the number of person who can reside in a building, which limits population density. Placing similar limits on commercial and industrial buildings helps to limit the number of community members, thus indirectly controlling the population of that community and of others within commuting distance.

Courts are divided with respect to the constitutionality of minimum lot zoning. Five-acre minimum lot zoning requirements have been upheld by several courts.³⁴ Other courts have held that a 3-acre minimum residential zoning ordinance, combined with minimum floor area and cubic content requirements, was not a justifiable method for preserving the aesthetics of a community³⁵ and that a 4-acre minimum lot zoning ordinance was not a valid means of creating a "greenbelt."³⁶ Another holding, balancing the rights of a private owner with the needs of the community, invalidated a 5-acre minimum lot zoning requirement.³⁷

Because of the public policy reasons for attempting to stabilize a community's population, courts should uphold the constitutionality of minimum lot zoning requirements which are

³³ Forer, *Preservation of America's Park Land: The Inadequacy of Present Law*, 41 N.Y.U.L. REV. 1093 (1966); Note, *Municipalities: Validity of Subdivision Fees for Schools and Parks*, 66 COLUM. L. REV. 974 (1966).

³⁴ E.g., *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Fischer v. Bedminster Tp.*, 11 N.J. 194, 93 A.2d 378 (1952).

³⁵ *Hitchman v. Oakland Tp.*, 329 Mich. 331, 45 N.W.2d 306 (1951).

³⁶ *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

³⁷ *National Brick Co. v. County of Lake*, 9 Ill. 2d 191, 137 N.E.2d 494 (1956).

not a method of racial discrimination,³⁸ and which do not constitute a taking of property without just compensation, in violation of the fifth or fourteenth amendments, by so limiting the uses to which the property can be put so as to make the property "wholly useless,"³⁹ or "to deprive the owner of all or most of his interest in the subject matter . . ."⁴⁰ As long as a property owner is left with at least one profitable use of his land, such zoning restrictions should not be invalidated.⁴¹

Minimum floor area standards which were applicable to residential, business, and industrial districts have been upheld,⁴² and a zoning ordinance restricting building heights in St. Paul, Minnesota, has been upheld—though based only upon aesthetic considerations.⁴³ Congress has, since 1910, limited the height of buildings in Washington, D.C., to 130 feet.⁴⁴ The public, however, must be willing to support such ordinances. In elections of November 2, 1971, a proposal to limit all new buildings in San Francisco to six stories was defeated by a 2 to 1 margin, while the voters of Boulder, Colorado approved a resolution to limit the height of buildings to 55 feet at the same time they defeated a resolution to stabilize population.⁴⁵

A developing body of case law points to a contingent obligation upon municipalities to open their doors to low and moderate income housing. Some commentators argue that exclusionary zoning violates the "right to travel" guaranteed by

³⁸ See 2 T. EMERSON, D. HABER, & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1599-1600* (stud. ed. 1967). See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Anderson v. Town of Forest Park*, 239 F. Supp. 576 (W.D. Okla. 1965).

³⁹ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (dictum).

⁴⁰ *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

⁴¹ See, e.g., *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954); *Morris County Land Improvement Co. v. Township of Parsippany—Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963); *Eaton v. Sweeny*, 257 N.Y. 176, 177 N.E. 412 (1931); *Greenhills Home Owners Corp. v. Village of Greenhills*, 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd on other grounds*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1966). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴² *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953). See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

⁴³ *City of St. Paul v. Chicago, St. P., M. & O. Ry.*, 413 F.2d 762 (8th Cir.), cert. denied, 396 U.S. 985 (1969).

⁴⁴ *Washington Post*, Nov. 19, 1971, § B, at 1, col. 2.

⁴⁵ *Id.*, Nov. 4, 1971, § A, at 12, col. 2.

Shapiro v. Thompson.⁴⁶ This case law and scholarly comment must be taken into consideration in the proposal of any growth control measure.

Zoning as a device for growth control is coming under increased scrutiny by the courts to insure that it does not exclude racial groups and certain economic groups.⁴⁷ Pennsylvania has gone farthest in fashioning the early racial discrimination cases into a body of law to combat most types of exclusionary zoning. In *National Land & Inv. Co. v. Kohn* the court stated:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.⁴⁸

The court, however, did recognize zoning as a legitimate measure to insure orderly and rational development.⁴⁹ The court further expanded on *National Land* in *Appeal of Kit-Mar Builders, Inc.* where it stated:

The implication of our decision in *National Land* is that communities must deal with problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.⁵⁰

Contrarily, a recent New York Court of Appeals case held that a municipality had the right to freeze development of vacant land until town officials are prepared to provide sewers and other services, though this might take as long as another generation. The court found:

Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted

⁴⁶ 394 U.S. 618 (1969); see Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9, 21-25; see also *Edwards v. California*, 314 U.S. 160, 173 (1941); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYR. L. REV. 509 (1971); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.J. 732 (1970); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

⁴⁷ See *Duffcon Concrete Prod., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949); *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). But see *Vickers v. Township of Comm. of Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962), cert. denied, 371 U.S. 233 (1963).

⁴⁸ *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597, 612 (1966).

⁴⁹ *Id.*

⁵⁰ 439 Pa. 466, 469, 268 A.2d 765, 768 (1970). See also *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

ghettos with attendant hazards to health, security and social stability⁵¹

Without avoiding the obvious conflict between these two lines of cases, it would appear that if a municipality is to adopt growth control devices, those devices had best apply to *all* development equally, rather than be tainted by a similarity to methods of racial or economic discrimination.⁵²

There remain, however, strong public policy arguments for allowing communities to set nondiscriminatory population limitations. Various communities and geographic areas have different capacities to accommodate growth. In the West, for example, water is scarce and often unobtainable. Additional municipal water must be obtained at the expense of the agricultural sphere or at the expense of another geographic area. A community must eventually have the right to prevent its own destruction by balancing its available resources with its population growth.⁵³

C. *Open Space Preservation*

California empowers cities and counties to use zoning laws to regulate open space for purposes of recreation, enjoyment of scenic beauty, and use of natural resources.⁵⁴ Its cities and counties are required to adopt local open space plans to provide for "comprehensive and long range preservation and conservation of open space land within their jurisdiction,"⁵⁵ and such open space plans must include specific implementing programs. The issuance of building permits, subdivision approval, and open space zoning ordinances must comply with such provisions. California also requires the general plans of local planning agencies to consider open space requirements and to provide for the conservation, development, and utilization of natural resources (including harbors and forests).⁵⁶

By state law, Maine land areas within 250 feet of the normal high water mark of navigable waters are subject to local

⁵¹ *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972). See also *Lee Jackson Dev. Corp. v. Board of Supervisors*, 3 ENVIR. REP. 1961 (Va. Cir. Ct., Loudon Cty., 1972).

⁵² Some states have adopted legislation directed at this problem. See MASS. ANN. LAWS ch. 40B, §§ 20-23 (Supp. 1969); N.Y. URBAN DEVEL. CORP. LAW §§ 6251, 6266(3) (McKinney 1971).

⁵³ But see REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *supra* note 1, at 208. "[A]ccommodation of future population is a public responsibility which must be shared by all communities and dealt with on a broad scale."

⁵⁴ CAL. GOV'T CODE § 65850(a) (West Supp. 1972), *amending* (West 1966).

⁵⁵ *Id.* § 65563 (West Supp. 1972).

⁵⁶ *Id.* § 65302(d)-(e) (West Supp. 1972), *amending* (West 1966).

zoning and subdivision control.⁵⁷ The regulations are authorized to protect spawning grounds, fish, aquatic life, birds, and other wildlife habitat; to control building sites, the placement of structures, and land use; to conserve shore cover; and to provide visual as well as actual access to inland and coastal waters and points of natural beauty. If a municipality fails to adopt such ordinances, the State Environmental Improvement Commission (which authorizes the Attorney General to enforce the statute providing for statewide control of industrial development⁵⁸) and the Maine Land Use Regulation Commission (which enforces the statute regulating development in unorganized and deorganized townships⁵⁹) are directed to adopt suitable ordinances to be administered and enforced by the municipalities. This statute thus allows local municipalities to participate in the control of Maine's coastal wetlands, but their ordinances are subject to approval of the state. In addition, a locality's issuance of permits for wetlands development is subject to veto by the Wetlands Control Board under provisions of another Maine statute.⁶⁰ This latter veto provision thus allows state agencies to exercise control over each individual wetlands development project authorized by local communities, while the former provision enables state control of local ordinances through which individual development projects are authorized. Maine has also required municipal subdivision regulations and subdivision plans to prevent undue adverse effects on scenic or natural beauty, aesthetics, historic sites, or rare and irreplaceable natural areas.⁶¹

In general, municipalities cannot constitutionally use zoning for open space to reduce the market value of land in order to condemn the property in the future at lower cost.⁶² In addition, zoning regulations imposing indefinite moratoriums on the development of land, subject only to variances at the request of the owner, are probably unconstitutional takings of property without just compensation.⁶³ To avoid holding a zoning regulation intended to preserve open space an unconstitutional taking of property without just compensation, either on its face or as

⁵⁷ ME. REV. STAT. ANN. tit. 12, § 4811 (Supp. 1972).

⁵⁸ *Id.* tit. 38, §§ 481-88 (Supp. 1972). See also text accompanying notes 144 & 145 *infra*.

⁵⁹ *Id.* tit. 12, §§ 683 *et seq.* (Supp. 1972). See also text accompanying note 146 *infra*.

⁶⁰ *Id.* tit. 12, § 4702 (Supp. 1972).

⁶¹ *Id.* tit. 30, § 4956(3) (I) (Supp. 1972), formerly ch. 365 § 2, [1969] Laws of Me. 974.

⁶² See, e.g., Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 208-13 (1961).

⁶³ *Id.* at 187.

applied to a particular case, courts should permit a municipality to condemn a fee or lesser interest in the property and uphold the land use regulations imposed by the zoning law.⁶⁴

D. *The Krasnowiecki & Paul Open Space Proposal*

A theory of open space preservation which integrates traditional zoning principles with satisfactory legal compensation is suggested by Krasnowiecki and Paul.⁶⁵ Under their theory, a community determines which privately owned areas should be preserved as open space, and then values such properties under the same principles by which property is valued in condemnation proceedings. The local government guarantees these values to the property owners. The total amount of these guarantees equals the compensation which is paid to the property owners if their fee were condemned on the date when the open space program became effective. Instead of condemning the fee, however, the local government promulgates detailed regulations to control the use of the property for open space purposes. The owner is paid, through the local government's guarantee, the amount by which such control reduces the value of his property for the uses to which it is actually being put at the time the open space controls are imposed. Unlike the acquisition of easements, this program does not have local governments pay a landowner for the value of his property for future development—values, real or imaginary, which the property owner may or may not have intention of realizing.⁶⁶

If such open space controls reduce the value of the property for other than existing uses (i.e., the value of the property for future development), the owner is compensated by the government through an administratively-supervised public sale in an amount by which the guaranteed value of his property exceeds the price paid to him for his land at the public sale. The governmental guarantee for that particular property is reduced by the amount of damages or compensation paid by the government to each successive owner after each public sale. Consequently, the damages and compensation paid by the government for open space preservation under this program would not exceed the guaranteed value of a particular piece of property.

This method of open space control does not compensate a landowner for the development value of his property for pur-

⁶⁴ *Id.* at 190-92.

⁶⁵ Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961).

⁶⁶ See generally discussion of Conservation Easements in State Alternatives section in text p. 36 *infra*.

poses other than those to which the property was being put on the effective date of the program. Because the owner is paid, at the date the program becomes effective, for the decrease in value of his property for its existing uses, the compensation paid him after the public sale would represent the loss of the value of his property since the time the controls were imposed.

Krasnowiecki and Paul believe that requiring a property owner to sell his property before receiving compensation for its future development value is a fair balance between the governmental interests and the rights of the property owner, and would thus be constitutional. The authors, however, would pay compensation in some cases where the fifth and fourteenth amendments do not require such compensation. They justify such payments on the grounds that to attempt to determine when compensation was constitutionally required, rather than to pay compensation in all cases according to a standard formula, would make the program too costly and administratively unmanageable on a case by case basis.⁶⁷

This proposal, unlike the acquisition of negative easements, postpones compensation for the loss in value of property for future development until a time when the landowner would normally have realized that development value, and determines the amount of such compensation of the loss of the price actually paid for the regulated property. The public sale requirement is intended to protect the government against fraudulent sales designed to draw upon the government's guarantee, a guarantee which continues as long as the land is regulated as open space. Losses are guaranteed in value as a result of the regulation, as a result of depreciation in real estate values generally, and as a result of inflation of the dollar.

These latter two guarantees against general real estate depreciation and inflation are not required by the constitutional prohibitions against the taking of property without just compensation and should be excluded from this proposal as an unjustified gift of public funds to private property owners. States with constitutional prohibitions against the payment of public funds as gifts to private parties, or against the use of public funds for private purposes, might require that compensation paid under this proposal be only that required by the constitution. This proposal is otherwise an innovative program combining zoning and eminent domain concepts for more successful and

⁶⁷ Krasnowiecki & Paul, *supra* note 65, at 199.

less costly open space preservation than could be accomplished by the use of either zoning or eminent domain alone.

E. *Other Innovative Approaches*

Municipalities might require private land owners to comply with regulations similar to those of section 102(2) (C) of the National Environmental Policy Act of 1969⁶⁸ before any alteration of the land would be permitted. The Town of Huntington, Long Island, New York, has adopted an ordinance which requires applicants for building permits to file environmental impact statements similar to those required by section 102(2) (C) of the 1969 Act, and to minimize the environmental impact of any construction or development of their land.⁶⁹

Local communities can also encourage local property owners to preserve open space. In addition to the method of negative easements and tax policies, municipalities could follow the Lake George approach,⁷⁰ which combines zoning with private land use controls such as equitable servitudes, real covenants, and easements. Lake George, New York, has sought to aid private property owners to preserve open space and keep areas residential by encouraging them to execute restrictive covenants and easements restricting the use of their property for commercial uses. If all property owners in a given area sign such covenants to make the area a residential zone, the Lake George Park Commission can zone the area residential.⁷¹

Municipalities have adopted so-called "official maps" reflecting their present official decisions to later condemn areas and locate future streets, parks, and other facilities as marked on the map.⁷² The decisions reflected on the map are implemented by prohibiting development or improvement in those areas marked for future acquisition and are enforced by court injunctions and by denying compensation for unauthorized improvements when the land is later condemned. These statutes have generally been held to be an unconstitutional taking of property without just compensation unless they contain a clause allowing the owner, upon a showing that his land as mapped cannot yield a fair return, to improve the property to the extent

⁶⁸ 42 U.S.C. § 4332(2) (C) (1970).

⁶⁹ Statement, Jerome A. Ambro, Supervisor, Town of Huntington, New York (Feb. 23, 1971).

⁷⁰ See Eveleth, *New Techniques to Preserve Areas of Scenic Attraction in Established Rural-Residential Communities—The Lake George Approach*, 18 SYR. L. REV. 37 (1966).

⁷¹ *Id.*

⁷² See Krasnowiecki & Paul, *supra* note 65, at 184-86; Kucirek & Beuscher, *Wisconsin's Official Map Law*, 1957 WIS. L. REV. 176.

necessary to give him a fair return.⁷³ But this clause disrupts open space preservation programs when landowners are permitted to improve their land pursuant to these "shock absorber" clauses. Where the moratorium on land improvement and development imposed by official map laws has been extended to provide for future park acquisition, it has generally been limited to a period of 1 year.⁷⁴

Finally, an orderly growth and population dispersion pattern in urban areas could be encouraged by appropriate urban renewal and public housing programs. Many of the early efforts built high-rise residential buildings that were close together and had little adjacent open space and parkland. The public housing program of Mayor Daley in Chicago and many of the housing projects in New York City, including the mammoth and still-uncompleted Co-op City, are examples of such urban renewal programs. Other cities, however, such as New Haven, Connecticut, built low density housing units through federal grants under the Model City Programs.

Local urban renewal programs should be designed to eliminate slums and blighted areas in our nation's cities, to revitalize business in urban areas, and to build moderate-cost public housing. Well-planned local urban renewal programs can prevent the flight of the white middle class to the suburbs, a situation which leaves poor blacks and other low-income minority groups as the majority of the population in several of our cities and which means the loss of necessary taxes for essential public services. If urban renewal programs do not seek to support the dispersal of people and stabilize a city's population, but instead create high densities and uncontrolled population growth, urban problems will increase.

The federal government should require local governing bodies which seek federal urban renewal loans or capital grants⁷⁵ to develop urban renewal plans which preserve open space and limit population density and growth in urban areas. At present, contracts for urban renewal loans or capital grants can be made by the Department of Housing and Urban Development only if the urban renewal plan has been found by the local governing body to conform to a general plan for development of the locality as a whole and gives due consideration to the provision of adequate park and recreational areas and

⁷³ *Id.*

⁷⁴ See Krasnowiecki & Paul, *supra* note 65, at 184-86.

⁷⁵ See generally 42 U.S.C. §§ 1441 *et seq.* (1970).

facilities.⁷⁶ Federal urban renewal loans and capital grants should also be conditioned upon due consideration by the local urban renewal authority, the local housing authority, and the local governing body for a federal policy to limit population growth and density in urban areas through devices such as height restrictions on residential, commercial, and industrial buildings, a limitation on the percentage of a lot which could be occupied by a building, and cubic content requirements for each individual dwelling unit. Federal loans to nonprofit, private corporations to build housing in urban areas under section 202 of the Federal Housing Act, and FHA guaranteed loans to private developers to build housing, should be subject to similar constraints.⁷⁷ Other federal programs which encourage construction of housing⁷⁸ should seek to further a policy of open space preservation, population dispersion, and control of population and industrial growth.

F. The Municipal Taxpayer's Standing to Propose Alternatives

A municipal taxpayer has the right to assert his equitable ownership of municipal property in suits to enjoin diversion or misuse of municipal property.⁷⁹ This right arises from the doctrine that a city or municipality owns and administers municipal property—such as streets and parks—as trustee for the resident taxpayers.⁸⁰

Land dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city or town in which the park is located may maintain a suit in equity to prevent diversion of the use of such land, since "courts of equity always interfere at the suit of a cestui que trust or the cestui que use to prohibit a violation of the trust or a destruction of the right of the user. . . ."⁸¹

In *Douglass v. City Council of Montgomery*,⁸² the court indicated, though in dictum, that any individual property owner in a municipality (and thus a municipal taxpayer) should have standing to sue against the municipality and private action to protect the municipal parks. Where state law recognizes a municipal taxpayer as being the equitable owner of, and as

⁷⁶ 42 U.S.C. § 1455 (1970).

⁷⁷ See generally *A DECENT HOME, A REPORT BY THE PRESIDENT'S COMMITTEE ON URBAN HOUSING* (1969).

⁷⁸ *Id.* at 12.

⁷⁹ *Davenport v. Buffington*, 97 F. 234, 237 (8th Cir. 1899); *Archbold v. McLaughlin*, 181 F. Supp. 175 (D.D.C. 1960); see Comment, 38 U. COLO. L. REV. 391 (1966).

⁸⁰ *Hague v. CIO*, 101 F.2d 774, 785 (3d Cir. 1939), modified, 307 U.S. 496 (1939); *Smith v. Corporation of Wash.*, 61 U.S. 135, 147 (1857).

⁸¹ *Archbold v. McLaughlin*, 181 F. Supp. 175, 180 (D.D.C. 1960) (footnote omitted); see *Davenport v. Buffington*, 97 F. 234, 237 (8th Cir. 1899).

⁸² 118 Ala. 599, 613, 24 So. 745, 748 (1898).

having an equitable interest in, municipal property, the taxpayer may bring suit in federal district court under federal question jurisdiction⁸³ to assert this interest.⁸⁴ This standing of a municipal taxpayer traditionally has been based upon the taxpayer's monetary interest in municipal property.⁸⁵ Several courts, on the other hand, have extended this doctrine to include the right to the use of municipal property.⁸⁶ Standing in these cases is based as much upon the fact of dedication to the public of the property involved as upon the monetary interest of a taxpayer or the possible increase in taxes that might result to the taxpayer.⁸⁷

II. INTRASTATE REGIONAL LAND USE ALTERNATIVES

Above the local level but below the state level, a possible solution exists for gaining the perspective and authority necessary to make rational growth decisions. Regional solutions are not only possible, but presently their use is increasing. Where binding regional governments are not in existence, there is opportunity for local cooperation in forming regional bodies that have recommendatory functions. These two forms are set out below.

A. Regional Government

In some states, the possibility of regional government is being seriously explored at present.⁸⁸ Minnesota, in an attempt to find an intermediate step between special purpose districts and multi-jurisdictional general purpose governments, created the Metropolitan Council of Minneapolis-St. Paul.⁸⁹ Minnesota had previously required, by statute, a regional review by a metropolitan council for projects in the Minneapolis-St. Paul area. Municipal units within that area had been required to submit to the council their "proposed long term comprehensive plans or any proposed matter which has a substantial effect on metropolitan area development"⁹⁰

⁸³ 28 U.S.C. § 1331 (1970).

⁸⁴ *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967).

⁸⁵ The standing of the municipal taxpayer in such suits has been predicated on the similarity to a private stockholder suing in a derivative suit. *Scott v. Frazier*, 258 F. 669, 674 (D.N.D. 1919).

⁸⁶ *Davenport v. Buffington*, 97 F. 234 (8th Cir. 1899); *Archbold v. McLaughlin*, 181 F. Supp. 175 (D.D.C. 1960). The real interest that the municipal taxpayer asserts in such a suit is the value of the right to use municipal property. *Davenport v. Buffington*, *supra*, at 236.

⁸⁷ *Davenport v. Buffington*, 97 F. 234 (8th Cir. 1899).

⁸⁸ See GOVERNOR'S LOCAL AFFAIRS STUDY COMMISSION, LOCAL GOVERNMENT IN COLORADO (Sept. 1966).

⁸⁹ See ch. 24, S.F. No. 10, [1971] Minn. Sess. Laws 1827 (to be codified as) MINN. STAT. §§ 473F.01 to -.13 (1971).

⁹⁰ MINN. STAT. § 473B.06(7) (1969), as amended, ch. 541, S.F. No. 1024, [1971] Minn. Sess. Laws 841.

The new council is organized as a body of members representing districts of substantially equal population. It is designed to facilitate planning and coordinate the delivery of certain services for the Twin Cities area. In 1971 the legislature gave the council a limited taxing power to effect policy and financial coordination over water, sewer, airports, and certain other single-purpose authorities within the metropolitan areas. The purpose of the new power was "to provide a way for local governments to share in the resources generated by the growth of the area, without removing any resources which local governments already have [and] [t]o increase the likelihood of orderly urban development"⁹¹

Forty percent of all Twin Cities industrial-commercial tax base added subsequent to 1971 will be shared on a regionwide basis. The sharing of this tax base is determined by population but adjusted if its property valuation is below the metropolitan average per capita property valuation.⁹² Thus, tax base is shared on an equalizing basis which will help lessen the competition among localities to increase the industrial and commercial property taxes within their borders.

B. *Local Cooperation*

Most metropolitan areas have not gone as far as Minneapolis-St. Paul in establishing regional institutions. More commonly, they tend to operate in metropolitan councils of governments which create nonbinding coordination levels below the state level.⁹³ There are, at the present time, some 650 multi-jurisdictional planning bodies in existence.⁹⁴

This type of multi-jurisdictional cooperation was given a boost by section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, which requires that specific types of federal grant-in-aid applications from individual local governments located within standard metropolitan statistical areas be subject to review and comment by an area-wide agency.⁹⁵ A large increase in area-wide agencies has resulted, which was furthered by the issuance of Circular A-95 by the Office of

⁹¹ Ch. 24, S.F. No. 10 § 1(1), (2), [1971] Minn. Sess. Laws 1827 (to be codified as) MINN. STAT. § 473F.01(1), (2) (1971).

⁹² *Id.*

⁹³ DOMESTIC COUNCIL, EXECUTIVE OFFICE OF THE PRESIDENT, REPORT ON NATIONAL GROWTH 48 (1972).

⁹⁴ *Id.* at 52.

⁹⁵ 42 U.S.C. § 3334 (1970).

Management and Budget on July 24, 1969.⁹⁶ Under A-95 provisions, applications for grants for water and sewer, outdoor recreation, highway planning and construction, hospitals, law enforcement, and similar facilities must receive area-wide review and a review by state government. The overall effect of this review process is not yet certain. It clearly would seem to be a method for increasing cooperation in metropolitan areas and for helping to formulate and execute urban growth policies.

Apart from A-95 applications, the courts are likely to approve such cooperation and coordination by local governments. Local governments have been allowed to "provide cooperatively for the needs of neighboring communities as well as [their] own,"⁹⁷ and have been required to give due consideration to the needs and conditions of surrounding communities.⁹⁸ Through such coordination and cooperation, local communities would not have to allow every use within their boundaries,⁹⁹ provided that an excluded industry—which could not be prohibited in every community as a nuisance—could be located in a nearby community.¹⁰⁰

The possibilities of regional attempts at growth control—either on a cooperative or a more structured basis—are promising, although local tensions and jealousies have tended to retard their full potential in the past. This level of government, however, affords too many advantages to not be utilized in the future. Regional cooperation or government promises a level of decisionmaking beyond the narrow perspective of single purpose districts and the chauvinism of small governmental units. It offers a control structure close enough to be responsive to the people, but sufficiently removed to gain needed perspectives. The Minnesota experience may stimulate many decisionmakers toward regional land use mechanisms.

⁹⁶ Issued under authority of the Intergovernmental Cooperation Act of 1968 which provided that: "The President shall . . . establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having significant impact on area and community development . . ." 42 U.S.C. § 4231(a) (1970).

⁹⁷ *Andrews v. Board of Adjustment*, 30 N.J. 245, 251, 152 A.2d 580, 583 (1959).

⁹⁸ *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). See Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L. J. 720 (1962). See also *River Vale Tp. v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968).

⁹⁹ Cf. *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 325, 139 A.2d 749, 752 (1958).

¹⁰⁰ See *Duffcon Concrete Prod., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

III. STATEWIDE LAND USE ALTERNATIVES

Vigorous policies of state growth control are largely recent in origin. The regulation of the land within its boundaries was a tenth amendment power impliedly reserved to each state.¹⁰¹ The states, in turn, have delegated much of that authority to local governments. States are finding today that they have, in fact, delegated too much responsibility to local governments which have neither the expertise nor the perspective to make large scale land use decisions or to solve problems which cut across local boundaries. This dilemma has been succinctly described by the 1972 Yearbook of Agriculture:

Presently, land development is an aggregate of thousands of unrelated decisions made by single-purpose agencies, local governments, and private land owners without regard for each other or for regional, statewide, and national concerns.¹⁰²

Among the alternatives available to the states to assume command of this situation and to control population distribution within their boundaries are: setting aside of state parklands, passage of state environmental policy acts and statewide land use control programs, and the encouragement of a population distribution policy through taxing, conservation easements, and incentives to private land owners to grant public access to open space. These choices are developed below with special emphasis on some of the state-instituted land use programs that are proving successful.

A. State Parklands

State governments, though to a lesser extent than the federal government, have set aside virgin land, wilderness, and open space for the benefit of the public. The 2,136,857 acres preserved as "forever wild" in 1894 by the New York Constitution in the Adirondack Forest Preserve is the outstanding example of state preservation of wilderness open space.¹⁰³ Timber on this state-owned preserve cannot be cut, sold, removed, or destroyed; and other commercial and industrial development is prohibited within the preserve. The State of California, in conjunction with the Save-the-Redwoods League, has set aside "some of the finest primeval groves in 28 redwood state

¹⁰¹ The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X.

¹⁰² YEARBOOK OF AGRICULTURE, *supra* note 26, at 207.

¹⁰³ N.Y. CONST. art. 14, § 1. See Comment, *Permissible Uses of New York's Forest Preserve Under "Forever Wild,"* 19 SYR. L. REV. 969 (1968).

parks."¹⁰⁴ These parks protect about one-tenth of the redwoods still standing in California.¹⁰⁵ The Redwoods National Park was designed to incorporate three of these state parks. The State of Washington has established, as part of its coast, a seashore conservation area to be preserved in its natural state, or best possible condition, for public recreational use.¹⁰⁶

A number of states have instituted programs providing for the continual acquisition of open space and parkland by the state.¹⁰⁷ The New Jersey Green Acres Land Acquisition Act of 1961¹⁰⁸ authorizes the state to provide funds to local governments to acquire lands for public recreation and the conservation of natural resources. Pennsylvania has enacted two constitutional amendments,¹⁰⁹ implemented by statute,¹¹⁰ authorizing massive bond-issue-supported state spending. The purpose is the acquisition of state and local parks and reservoirs for conservation, recreation, open space, and historical preservation. As well, the reclamation and development as parklands of abandoned strip mine areas is sought. The success of such a program, of course, depends upon the market for the bonds, and may be less effective than a program financed by appropriations from taxes collected.

Unfortunately, only a limited number of states attempt to protect public parklands from being taken for highways or other uses.¹¹¹ The prior public use doctrine,¹¹² which in many states requires a specific legislative authorization of condemnation of public parks, or other lands devoted to a public purpose, has been inadequate to protect state and local parklands from being taken to build highways.¹¹³ In addition, courts have not applied the prior public use doctrine to protect privately owned

¹⁰⁴ F. LEYDET, *THE LAST REDWOODS AND THE PARKLAND OF REDWOOD CREEK* 19 (1969).

¹⁰⁵ Atkinson, *California Redwoods, a Country's Natural and Spiritual Resource, Are in Danger*, N.Y. Times, Jan. 7, 1964, at 30, col. 4.

¹⁰⁶ WASH. REV. CODE ANN. §§ 43.51.650-.685 (1970).

¹⁰⁷ ILL. ANN. STAT. ch. 105, §§ 465a *et seq.*, 501 *et seq.* (Smith-Hurd Supp. 1972); N.J. REV. STAT. §§ 13:8A-1 to -18 (1968); N.Y. CONSERV. LAW §§ 1-0701 to -0715 (McKinney 1967), 2-0101 to -0117 (McKinney Supp. 1972); OHIO REV. CODE ANN. §§ 1517.01-.09 (Page Supp. 1970).

¹⁰⁸ N.J. REV. STAT. §§ 13:8 A-1 to -18 (1968).

¹⁰⁹ PA. CONST. art. 8, §§ 15, 16.

¹¹⁰ PA. STAT. ANN. tit. 32, §§ 5101-21 (Supp. 1971), tit. 72, §§ 3946.1-.22 (1968).

¹¹¹ See Forer, *supra* note 33, at 1106-07.

¹¹² The prior public use doctrine, where applicable, restricts one governmental body in the condemnation of land used for public purposes by another governmental body, usually requiring, at minimum, specific legislative authorization from the condemning body.

¹¹³ See Forer, *supra* note 33, at 1104-05. See generally Note, *Reconciling Competing Public Claims on Land*, 68 COLUM. L. REV. 155 (1968).

wildlife refuges or other privately owned open space.¹¹⁴ Forer has proposed a statute that would modify the prior public use doctrine to afford greater protection to public parklands, and to authorize citizen litigation to challenge takings of public parklands for other public purposes.¹¹⁵

B. *Environmental Policy Acts*

If states enact environmental policy acts similar to the National Environmental Policy Act of 1969,¹¹⁶ agencies of the state government—including municipal governments created by the state—could be restrained from actions which adversely affect the environmental value of open space and wilderness areas or which encourage population growth and development in the same manner that federal agencies are restrained by the 1969 Act. These statutes would make the power of eminent domain subject to environmental considerations.¹¹⁷

California has adopted such a statute, the California Environmental Quality Act of 1970.¹¹⁸ It is applicable to state agencies, boards, and commissions. Local governmental agencies are required to make environmental impact statements with respect to land acquisition or construction projects for which they receive an allocation of state or federal funds from a state agency. Where city and county legislative bodies have officially adopted a conservation element for a general plan, they are required to find that any project they undertake which may have significant effects upon the environment be in accord with such conservation element. All other local governmental agencies must make environmental impact reports to the appropriate local planning agency with respect to any project they intend to carry out and which may have a significant effect upon the environment.¹¹⁹

C. *State-Initiated Regional Land Use Plans*

A number of states have enacted regional land use plans and programs similar to those which would be required by bills introduced in the first session of the 92d Congress.¹²⁰ Such

¹¹⁴ *Texas E. Trans. Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966), *aff'd* (after remand), 49 N.J. 403, 230 A.2d 505 (1967). See Tarlock, *Eminent Domain—Review of Route Selection Made by Public Utility through Private Wildlife Refuge*, 8 NAT. RES. J. 1 (1968); Note, 52 IOWA L. REV. 1209 (1967); McCarter, *The Case that Almost Was*, 54 A.B.A.J. 1076 (1968).

¹¹⁵ Forer, *supra* note 33, at 1122-23.

¹¹⁶ 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

¹¹⁷ See generally Note, *Eminent Domain and the Environment*, 56 CORNELL L. REV. (1971); Note, *Eminent Domain—Ecological Considerations and the Environment*, 5 SUFFOLK U.L. REV. 1079 (1971).

¹¹⁸ CAL. PUB. RES. CODE §§ 21000-151 (West Supp. 1971).

¹¹⁹ *Id.* §§ 21150, 21151. See also text accompanying notes 54-56 *supra*.

¹²⁰ See text accompanying notes 194-99, 215-20 *infra*.

statutes can be justified on the grounds that conflicting decisions by each local political subdivision of a state which resolve conflicts between economic development and environmental protection very often will not be in the best interests of the state, the nation, or even in the best interests of the region in which a particular community is geographically and economically located. A local community may decide to allow an industrial plant to be built on unique and valuable marshland or open space within its jurisdiction, whereas that plant might be built in a neighboring community on wasteland, while still satisfying the former community's economic needs. Only coordinated regional, statewide, or interstate land use planning can prevent such inefficiency in realization of benefits to the public from land use management.¹²¹

1. Estuarine Controls

Land use management of a region defined to encompass a seacoast or a bay or lake and its shoreline can be an effective means to protect coastal and estuarine areas where many communities border the water. If these various communities depend upon different means of economic support, they will likely afford varying degrees of protection to environmental values of land resources within their borders. This result could occur even if each community had to comply with a state statute requiring it to protect the environmental values of the land resources within its jurisdiction. Depending upon the economic needs of each community, such a statute would probably be interpreted differently by communities throughout a region, and a uniform land use policy providing protection of environmental resources and consideration of population distribution in the region would be unlikely. A community oriented toward industrial development might permit an industry to locate on its shoreline, while a state-created regional land use commission with regional enforcement powers might locate that industry in a nearby community, with fewer overall adverse environmental and population effects, but with equal economic benefits to the region.¹²²

¹²¹ See, e.g., the approach suggested by Krasnowiecki & Paul, *supra* note 65, at 208-13.

¹²² A general summary of state statutes regulating and protecting estuarine areas is presented in J. LUDWIGSON, *MANAGING THE ENVIRONMENT IN THE COASTAL ZONE* (1 ENVIR. REP. (Monographs) No. 3, May 1, 1970). See generally Delogu, *Land Use Control Principles Applied to Offshore Coastal Waters*, 59 KY. L.J. 606 (1971); Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351 (1970); Teclaff, *The Coastal Zone—Control over Encroachments into the Tidewaters*, 1 J. MARITIME L. & COM. 241 (1970).

A number of states have established regulatory programs designed to protect the environmental values of coastal and estuarine areas. The Georgia Coastal Marshlands Protection Act of 1970¹²³ requires a permit to be issued by the Georgia Coastal Marshlands Protection Agency before any marsh within the state's estuarine area can be dredged, drained, filled, or otherwise altered. The issuance of permits is based on consideration of the public interest, including conservation of wildlife and marine life, erosion, and effects upon navigable waterways. North Carolina,¹²⁴ California,¹²⁵ New Jersey,¹²⁶ Connecticut,¹²⁷ and Maine¹²⁸ have enacted similar permit programs to protect the environmental values of their wetlands. The Michigan Shorelands Protection and Management Act of 1970¹²⁹ is designed to protect the shores of the Great Lakes and connecting waterways within the jurisdiction of Michigan from adverse environmental damage by requiring county, city, village, and township zoning regulations to prevent damage to the Great Lakes shores. The state water resources commission has the power to disapprove zoning regulations for failure to comply with this requirement.

2. The San Francisco Bay Program

A regional land use program has been established in an attempt to preserve San Francisco Bay. In the 120 years prior to creation of the San Francisco Bay Conservation and Development Commission,¹³⁰ the area of San Francisco Bay had been reduced by 250 square miles. To prevent this rapid, and in many cases unplanned, filling of the bay, the Commission was empowered to control piecemeal filling of the bay by considering each particular fill application in terms of the effect of the fill upon the entire bay. The Commission has been given the power to issue or deny permits for any proposed project that involves placing fill, extracting materials, or making a substantial change in the use of any water, land, or structure within the Commissioner's jurisdiction (which extends 100 feet landward of, and parallel with, the highwater mark of San

¹²³ GA. CODE ANN. §§ 45-136 to -147 (Supp. 1971).

¹²⁴ N.C. GEN. STAT. §§ 113-229, 113-230 (Supp. 1971 (Pamph. No. 12 at 219)).

¹²⁵ CAL. PUB. RES. CODE § 6301 *et seq.* (1956), *as amended*, (West Supp. 1971).

¹²⁶ N.J. REV. STAT. §§ 13:9A-1 to -10 (Supp. 1971).

¹²⁷ CONN. GEN. STAT. ANN. §§ 22-7h to -7o (Supp. 1971).

¹²⁸ ME. REV. STAT. ANN. tit. 12, §§ 4701-58 (Supp. 1972).

¹²⁹ MICH. COMP. LAWS ANN. §§ 281.631-.645 (Supp. 1972).

¹³⁰ CAL. GOV'T CODE §§ 66600-53 (West 1966), *as amended*, 66601-61 (West Supp. 1971).

Francisco Bay¹³¹. In order to obtain a permit, the applicant must show that there is no alternative upland location for his project, that benefits to the public clearly outweigh detrimental effects upon the public, and the project is water-oriented (which includes, however, airports and bridges). Fill or dredging projects which are permitted must minimize adverse environmental effects.¹³¹

3. The Adirondack Park Protection

New York has established an Adirondack Park Agency¹³² because of the threat to the over 2 million acre Adirondack Forest Preserve from potential development of the 3.5 million acres of privately owned land intermixed and contiguous with the state parkland. The Agency has been empowered to prepare, in consultation with local governments, a land use and development plan applicable to all private land within the Adirondack Park. This plan is to provide for private land development in the Adirondack area to insure optimum overall conservation protection, preservation, development, and use of the resources of the park. Though the plan is subject to the approval of the state legislature and the governor and is advisory in nature, the Agency has the power to regulate private land development in the Adirondack area while the report is being prepared. The Agency will also prepare a master plan for management of state lands in the Adirondack area (i.e., the Adirondack Forest Preserve). States seeking to protect state parklands from the pressures of haphazard contiguous development of private lands might follow the example of the Adirondack Agency.¹³³

4. The Lake Tahoe Interstate Plan

Because of the rapid growth of the Lake Tahoe region bordering California and Nevada and the accompanying environmental degradation, Nevada and California have formed an interstate compact¹³⁴ to establish and enforce a general plan for the interstate Tahoe region. The general plan of the Tahoe Regional Planning Commission will have the force of a general ordinance applicable throughout the basin, with state agencies,

¹³¹ See generally Note, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CALIF. L. REV. 728 (1967).

¹³² N.Y. EXEC. LAW §§ 800-10 (McKinney Supp. 1971).

¹³³ See Broesche, *Land-Use Regulation for the Protection of Public Parks and Recreational Areas*, 45 TEXAS L. REV. 96 (1966).

¹³⁴ Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360; CAL. GOV'T CODE §§ 66800-01 (West Supp. 1971); NEV. REV. STAT. §§ 277.190-200 (1968). See *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

counties, cities, and other political subdivisions such as the California Tahoe Regional Planning Agency, having the power to adopt ordinances, rules, and regulations which conform with the minimum standards of the general plan of the Commission. Political subdivisions of the two states may adopt equal or higher standards than those of the general plan. The Commission can force political subdivisions of the two states to comply with the general plan by court action; violations of the general plan are misdemeanors.¹³⁵

The Tahoe Regional Planning Compact is an imaginative solution to an interstate land use management problem. By establishing an interstate commission with the power to implement and enforce a general plan for the two-state region, California and Nevada have achieved a more effective solution than if they had made the general plan advisory in nature (which is the case with the Adirondack Park Plan). This regional approach to land use management may be a most effective method to protect open space and provide for orderly development for states bordering the Great Lakes and coastal states, where urban sprawl proceeds beyond state borders.

5. The Maine Coastal Island Trust Commission

Maine has established the Coastal Island Trust Commission in order to protect its coastal islands.¹³⁶ This Commission has the duty to develop and maintain a comprehensive plan to preserve, restore, utilize, and develop the commercial, natural, scenic, historic, and recreational values of the coastal islands of Maine. The Commission's plan is to recommend action to be taken by local, state, and federal governments to solve the land use planning problems of the coastal islands. The Commission can recommend master plans and zoning ordinances for the coastal island trust areas to be established under the Act, and can issue guidelines prescribing standards for such plans and ordinances. Unlike the Tahoe Regional Planning Commission, which may only set minimum standards applicable to the basin, and must go to court to force noncomplying jurisdictions to adopt the standards, the Maine Coastal Islands Trust Commission has the power to directly adopt and enforce its own master plans and regulations if the state or its political subdivisions fail to do so.¹³⁷ This provision has the virtue of allowing local communities to set stricter environmental control standards, while assur-

¹³⁵ CAL. GOV'T CODE §§ 67000-130 (West Supp. 1971).

¹³⁶ ME. REV. STAT. ANN. tit. 12, §§ 641-46 (Supp. 1972).

¹³⁷ *Id.* § 644(2).

ing implementation of statewide or regional policy that protects environmental values in the absence of local action. The Commission, in addition, can recommend that the state or its political subdivisions acquire privately owned property or interests therein for use as parks and for preservation in a natural state, and can acquire such property or interests by donation or negotiated purchase — but not by eminent domain — if the state or its political subdivisions fail to do so.

6. The Delaware Coastal Strip

The State of Delaware is attempting an unusual approach to regional land use management of its coastal area. Rather than using the permit system, or minimum zoning and master plan standards established and enforced by a regional commission, Delaware has sought to protect coastal and estuarine areas for recreation and tourism by totally prohibiting industries considered to be heavy polluters from locating within a designated coastal strip. This coastal strip runs the length of the border from Pennsylvania to Maryland and has a width which varies from about a mile on the Delaware River in the north to about 10 miles at the widest point on Delaware Bay.¹³⁸ Wetlands extending up to 5 miles inland are protected by this coastal strip, while the seaward line extends to the middle of Delaware Bay and to the 3-mile territorial limit in the Atlantic Ocean. Delaware has specifically barred from this coastal zone, as heavy polluters, refineries, steel mills, paper mills, petrochemical complexes, and offshore bulk transfer terminals. Nonpolluting industries include "garment factories, automobile assembly plants, and jewelry and leather goods manufacturing establishments."¹³⁹ This Delaware statute may serve as a model for other states to enact statewide zoning regulations segregating industrial polluters and ecologically destructive development from a state's valuable land, water, and natural resources.¹⁴⁰ New York's Adirondack Park Agency and the Tahoe Planning Commission might attempt such a scheme, which could be used to control tourist facilities which threaten many public parks.

State-created regional zoning is a good approach to protect areas such as lakeshores, coastlines, and state parklands, with similar and interrelated environmental values, from the pressures of unregulated development. Regional land use management of such areas recognizes that the entire region is a unified land resource, and that commercial development that adversely

¹³⁸ Janson, *Delaware Bars Heavy Industry from Coast to Curb Pollution*, N.Y. Times, June 29, 1971, at 1, col. 2.

¹³⁹ *Id.* at 61, col. 1, 3.

¹⁴⁰ *Id.*

affects part of the resource in one community adversely affects the whole. Management at this level also recognizes that the pattern of economic development and thus, the distribution of population within the region, is of significance to all residents of the region, and should be regulated on a regional, rather than local, basis. Regional land use planning and management can be supervised by a state-level commission which considers the overall needs of the region, so that the economic greed of a local community cannot result in uncoordinated misuse of regionally-significant land resources.

D. *State-Initiated Statewide Land Use Plans*

Statewide land use management is an effective means of regulating open space, green belts, transportation corridors, and other growth related land use patterns. One state, Arizona, has initiated a special new communities act.¹⁴¹ Such statewide control can offer a truly viable response to the problem of coordinating regulation of various types of development in local communities. It can also complement the protection afforded to the environmental value of land resources by regional land use management. Hawaii has adopted statewide zoning which classifies, at a state level, all land in Hawaii into four classifications: urban, rural, agricultural, and conservational.¹⁴² Hawaii found that prior to 1961, development for urban land uses often tended to be in areas where it was uneconomical for public agencies to provide proper service facilities or that development would occur on some of the state's limited prime agricultural land. It was felt the answer to these problems and others was the statewide land use classification.¹⁴³ The Hawaiian experience, while of great importance, is probably not transferable to other states because of long standing local fears of statewide zoning. The materials that follow will explore other possibilities more politically achievable in the vast majority of states. Legislation is moving fast in this area and no attempt will be made to catalogue all of the recent legislation.¹⁴⁴ Instead, some important examples will be discussed.

1. *Maine Land Use Management*

Maine has supplemented its regional coastal islands trust statute and its coastal wetlands statute with a pair of statewide land use management programs. One program through the

¹⁴¹ ARIZ. REV. STAT. ANN. § 11-771 *et seq.* (1971).

¹⁴² HAWAII REV. STAT. § 205-2 (Supp. 1961).

¹⁴³ See generally UNIVERSITY OF HAWAII COOPERATIVE EXTENSION SERVICE, FACTS ABOUT ACT 205 (Public Affairs Series No. 11) (1971).

¹⁴⁴ See, e.g., Florida Land and Water Environmental Management Act of 1972, FLA. STAT. ch. 380 (Supp. 1972).

Maine Water and Air Environmental Improvement Commission, provides for statewide control of industrial development and location, for the purpose of minimizing adverse effects on the natural environment by industrial operations which would substantially affect the environment.¹⁴⁵ In order for industrial development or location of an industry to be approved, the developer must prove that there is adequate provision in his plans for fitting his project harmoniously into the existing natural environment and that his project will not adversely affect existing uses, the land's scenic character, natural resources, or property values in the municipality or in adjoining municipalities. This statute applies to industrial development occupying in excess of 20 acres, projects which involve drilling for, or excavating, natural resources, or structures which occupy in excess of 60,000 square feet on a single parcel of land.¹⁴⁶

Maine has also given the Maine Land Use Regulation Commission authority to protect the environment and to regulate the development of unorganized and deorganized townships and mainland and island plantations, an area comprising about 10 million acres—42 percent of the state's land.¹⁴⁷ The Commission has the authority to classify the lands under its jurisdiction into four types of districts—one type for protection of land in its natural state, one type for development, one type to be held for future development, and one type for commercial forestry and agriculture. In all of these districts, the Commission is required to insure the protection of the environment. The environmental controls of this statute, however, are not applicable to private power companies, single family houses occupied year round, and current farming and commercial forest protection. These exemptions may weaken the potential force of this statute.

The statute states that when it is in conflict with other statutes, the statute which is more protective of existing natural, recreational, and historic resources governs. Consequently, when the conditions for approval of industrial development or location imposed under the Maine statute providing statewide control of industrial development and location¹⁴⁸ conflict with the land use standards imposed under the deorganized and unorganized townships developments statute, the conditions which are more protective of the environment apply. But there is no

¹⁴⁵ ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1972).

¹⁴⁶ *Id.* § 482(2).

¹⁴⁷ ME. REV. STAT. ANN. tit. 12, §§ 683-85C (Supp. 1972); 2 ENVIR. REP. (Current Dev.) 321 (1971-72).

¹⁴⁸ ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1972). See text accompanying note 127 *supra*.

such provision to govern conflicts between the statute providing for statewide control of industrial development and location, and the statutes governing development on the Maine coastal wetlands¹⁴⁹ and on the Maine coastal islands.¹⁵⁰ A developer will have to comply with two or more sets of regulations where he seeks to construct a project on coastal wetlands or coastal islands, since he will be regulated also by the statewide development and location statute and may be additionally subject to the unorganized township statute and either the coastal islands or coastal wetlands statute. If the conditions required by each regulation conflict, the developer will have to comply with the standards requiring the strictest environmental protection — unless there is an irreconcilable conflict. In cases of irreconcilable conflict, one would hope that the respective commissions will reach an accord. If they cannot, the courts will have to untangle this legislative complication.

2. Vermont Land Use Management

Vermont has established a state environmental board and district environmental commissions to regulate land use and to establish comprehensive state capability, development, and land use plans.¹⁵¹ This statute applies to the construction of any improvements, by private persons, industry, or state and municipal government, of more than 10 acres; any commercial or industrial improvements on more than one acre of land within a municipality that does not have permanent zoning and subdivision laws; housing projects of more than 10 units; and any construction of improvements above 2500 feet elevation. This statute, however, does not apply to construction of pipelines, power or telephone lines, or other "corridor" development, which is to extend more than 5 miles. Construction for farming, logging, or forestry purposes below 2500 feet elevation are excluded, as are electric generation or transmission facilities certified by the state. Permits issued by a district environmental commission are required for development regulated by the Act, as well as for the sale of, or construction upon, land that is part of a subdivision containing 10 or more units. But no permit is

¹⁴⁹ ME. REV. STAT. ANN. tit. 12, §§ 4701-58 (Supp. 1972).

¹⁵⁰ ME. REV. STAT. ANN. tit. 12, §§ 641-46 (Supp. 1972). See text accompanying note 136 *supra*.

¹⁵¹ VT. STAT. ANN. tit. 10, §§ 6001-91 (Supp. 1971) Developers have been cooperating with state and local agencies under this statute to protect the mountains of Vermont. See Fales, *Can Our Mountains Be Saved?*, PARADE, OCT. 31, 1971, at 10, 12-13.

required if a subdivision is sold as a single unit. Permits may not be issued if the proposed subdivision or development will cause "unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result."¹⁵² Nor may permits be issued if the proposal would have an undue adverse effect on the scenic or natural beauty of the area, on the aesthetics of the area, on historic sites, or on rare and irreplaceable natural areas.

Permits also can be issued only after a finding that the subdivision or development will not result in undue air or water pollution, based upon a consideration of

the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and water resources department regulations.¹⁵³

The Act also requires that there be no unreasonable burdens on existing water supplies, on the ability of municipalities to provide educational or governmental services, or to proposed or existing highway systems.¹⁵⁴

Unfortunately, the statute does not define what is unreasonable or undue under the Act, and the environmental protection afforded to land resources by the Act will consequently depend upon the personal values and judgment of members of the commissions. In addition, the burden of showing adverse environmental effects to be "undue" is upon persons opposing issuance of a permit, though the burden is on the person seeking the permit to show that his proposal will not cause unreasonable soil erosion or pollute the air or water. The Commission may require the developer to dedicate lands for public use as a condition of the permit.¹⁵⁵

The permit system is enforced by provisions providing that deeds cannot be recorded without an accompanying certificate from a commission that the conveyance and development of the property is in compliance with the permit requirements. This Vermont statute provides, in addition, for a statewide land use plan to be developed by the environmental board, subject to approval by the governor and legislature. This plan is to be

¹⁵² VT. STAT. ANN. tit. 10, § 6086(a) (4) (Supp. 1971).

¹⁵³ *Id.* § 6086(a) (1).

¹⁵⁴ *Id.* § 6086(a) (3), (6), (5).

¹⁵⁵ *Id.* § 6086(c). See also text accompanying note 33 *supra*.

further implemented by local land use controls, such as subdivision regulations and zoning.¹⁵⁶

In order for statewide land use development to effectively protect environmental values, regulation under such programs must apply to all projects and development which may significantly affect the environment. State legislatures will have to resist the pressure of lobbyists for power companies and lumber companies, and other economic powers within the state, to exempt certain industries or economic interests from the requirements of such statutes. Rather than enacting laws like the Vermont statute, which leave approval of development to the discretion of commission members, statewide land use development regulations should be similar to the National Environmental Policy Act of 1969,¹⁵⁷ and require applicants for permits to develop land to file environmental impact statements like those required by that Act.¹⁵⁸ Regulation of development under such a statute, of course, would be limited by the constitutional prohibitions against the taking of property without just compensation.

E. *A Model Land Development Code*

The American Law Institute is drafting a Model Land Development Code¹⁵⁹ which updates the standard land use and zoning code proposed by the U.S. Department of Commerce in the 1920's and adopted by most states.¹⁶⁰ The new model code will recognize the increased need for state input in land use decisions. It will require a state land planning agency to establish rules and standards governing development having state or regional impact. The first decisional choice is retained at the local level, usually reserved to the county commissioners, but the state planning agency will have the right to review any of these decisions which have statewide impact. This scheme is

¹⁵⁶ VT. STAT. ANN. tit. 10, §§ 6081(a), 6041 *et seq.* (Supp. 1971). In a step that may result in programs similar to those of Maine and Vermont, North Carolina has established a state commission to prepare a study of state land use goals and policies to lead to eventual statewide land use planning. 2 ENVIR. REP. (Current Dev.) 412 (1971-72). California is presently considering regional coastal land use management bills. N.Y. Times, June 6, 1971, at 51, col. 1. Voters of Suffolk County, New York, have recently defeated a proposed amendment to the county charter which would have given the Suffolk Planning Commission the power to review all zoning changes or variances within 500 feet of any shoreline or waterway of more than 1,000 miles of Suffolk County's shoreline, subject to veto only by a majority-plus-one vote of the local township boards. Andelman, *Bond Issue Tied to Defeat of Suffolk Shoreline Plan*, N.Y. Times, Nov. 4, 1971, at 33, col. 7.

¹⁵⁷ 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

¹⁵⁸ *Id.* § 4332.

¹⁵⁹ ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 3 (1971)).

¹⁶⁰ See YEARBOOK OF AGRICULTURE, *supra* note 26, at 208.

designed to leave the decisionmaking power with local levels while at the same time vesting the right of review in the appropriate state agency where local plans threaten to contradict statewide growth policies. Similar legislation has been recommended by the Council of State Governments,¹⁶¹ and the newly-enacted Florida Land Management Act of 1972 was patterned after this model code.¹⁶²

F. Tax Policies

Critics have noted that most local property tax systems force owners of open space land to sell the land for development.¹⁶³ Property tax assessment is usually based upon the present fair market value of the land for its highest and best use. Thus, assessment of open space and undeveloped land is based upon consideration of the value of the land for potential development. As a result, property taxes are high compared to the low income which the owner receives from open space use of his land, and the property owner may have to sell to a developer because of an inability to pay the property taxes.¹⁶⁴ States can do much to encourage open space preservation by private landowners by structuring their tax rates so as to make it financially beneficial for a landowner to preserve his land as open space.¹⁶⁵

A number of states do attempt to encourage preservation of open space by private landowners by giving tax benefits to property owners who maintain their land as open space or recreational areas.¹⁶⁶ Several states provide for payments by the state to political subdivisions which lose taxes as a result of property within their jurisdiction being acquired for state parkland.¹⁶⁷ This decreases the pressure upon local municipalities to raise taxes upon other undeveloped property, forcing

¹⁶¹ See generally COUNCIL OF STATE PLANNING AGENCIES, *State and Local Land Use Planning*, in STATE PLANNING ISSUES (1971).

¹⁶² See Washington Post, Apr. 20, 1972, § E, at 3, col. 1, where the Act's chief sponsor, Senator Robert Graham, said, "Florida is the first state to adopt the American Law Institute's recommended approach. . . . This is an attempt for the state to use its influence in giving positive direction to development."

¹⁶³ See, e.g., McCloskey, Jr., *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 MICH. L. REV. 1167, 1170 (1970).

¹⁶⁴ *Id.*

¹⁶⁵ See generally, Note, *Toward Optimal Land Use: Property Tax Policy and Land Use Planning*, 55 CALIF. L. REV. 856 (1967).

¹⁶⁶ Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 291 n.86 (1966). See also Forer, *supra* note 33, at 1093-94 n.3.

¹⁶⁷ See, e.g., N.H. REV. STAT. ANN. § 216-A: 3-a (1964); PA. STAT. ANN. tit. 72, § 3946.19 (1968).

development of such land. In 1966, California adopted an amendment to its constitution which states that "assessment practices must be so designed as to permit the continued availability of open space lands for [the production of food and fiber production and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens]."¹⁶⁸ The legislature is given the power to implement this amendment.

Three methods of structuring a tax policy to encourage open space preservation have been suggested.¹⁶⁹ The first method is a general direction to tax assessors to presume that a land use control (such as zoning restrictions on the use of land) currently applied to a given parcel of land is permanent, in the absence of clear evidence to the contrary. Undeveloped land is thus not assessed at a value based upon the value of the property for development; rather, the assessor is directed to ignore surrounding land use classification and not presume imminent development. The second method suggested is preferential assessment—assessing land being used for a specified open space purpose at its value for its present use or for a use presently permitted by zoning regulations. This method allows some uses, such as open space, to be statutory preferences. The third method, tax deferral, involves postponing the payment of taxes on that portion of the market value of the land preserved as open space which exceeds the value of the property for its present use as open space, until the owner subjects the land to a more intensive use. The landowner pays a low tax as long as he does not develop his property, but if he ever subjects his land to commercial development, he must pay the accumulated difference between the low taxes he paid while maintaining his land as open space, and the higher taxes which reflect the full market value of the land for development.¹⁷⁰

The tax deferral approach probably does not cause a significant tax loss to the municipality; though the municipality collects no taxes on the land, the taxable base of surrounding land will probably increase because of its higher market value due to its proximity to the open space, tax-deferred land.¹⁷¹ But this increase in market value of surrounding lands also in-

¹⁶⁸ CAL. CONST. art. 28, § 1. See also Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?*, 42 S. CAL. L. REV. 59, 65 (1969).

¹⁶⁹ Moore, *supra* note 166, at 290-93.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 283.

creases the value of tax-deferred land for development, and probably makes it more likely that such property will be developed.¹⁷²

G. Conservation Easements

Rather than condemn private property in order to preserve open space, a state government might take a negative easement in private property.¹⁷³ Some states have used this method to establish aesthetic corridors alongside highways.¹⁷⁴ The method generally involves the government purchasing a negative easement, comprising a landowner's right to develop his property, with compensation paid for the resultant decrease in the value of the land. The landowner keeps title and can use his land in a manner that is not inconsistent with the rights conveyed to the government. The deeds creating such negative easements normally prohibit the erection of structures, the construction of roads, the removal of trees or other vegetation, and trash disposal on the land.¹⁷⁵

The acquisition of development rights by condemnation of easements or other interests less than fee is unlikely to be enforced by a court where the interest condemned is vaguely defined or, depending for definition upon the exercise of an official's discretion, "unless there is a definite community scheme applicable to a described area which can supply a standard against which the exercise of discretion involved can be measured."¹⁷⁶ In addition, acquisition of easements is a relatively expensive method of open space preservation; a state or municipality must anticipate a landowner's value realization many years in the future — value realizations which the landowner may have no intention of realizing — and must pay immediately for all the development value of the land from which the easement was acquired.¹⁷⁷ Compensation for condemnation of scenic easements, based on estimated future development value, may inflate the actual development value of contiguous land by focusing public attention on the development potential of the land.¹⁷⁸

¹⁷² Krasnowiecki & Paul, *supra* note 65, at 190.

¹⁷³ See generally W. WHYTE, *THE LAST LANDSCAPE* (1968); Moore, *supra* note 166.

¹⁷⁴ Williams, *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors*, 17 BUFF. L. REV. 701 (1968).

¹⁷⁵ Moore, *supra* note 166, at 281-84.

¹⁷⁶ Krasnowiecki & Paul, *supra* note 65, at 194 n.57 (citing dictum in a number of decisions).

¹⁷⁷ *Id.* at 195.

¹⁷⁸ *Id.*

H. *Encouragement of Public Access to Privately Owned Open Space*

In addition to encouraging private landowners to preserve open space through tax policies and other devices, a state should encourage a landowner to allow the public to use the open space which he owns. The federal government has several programs which provide financial encouragement to private land owners to permit public access for recreational purposes,¹⁷⁹ which the states could emulate. States could also increase payments for negative easements if a landowner opened his land to the use of the public. States could also enact, as Delaware has,¹⁸⁰ a statute limiting the liability of landowners who make land and water areas available to the public by abolishing the licensee-invitee obligations where the landowner does not charge the public to use his land. This makes the landowner liable only for malicious or willful injury to members of the public from the use of his land.

IV. FEDERAL LAND USE ALTERNATIVES

The Rockefeller Report on Population and the American Future has recommended that "[t]he federal government develop a set of national population distribution guidelines to serve as a framework for regional, state, and local plans and development."¹⁸¹ The difficulty in effectuating that recommendation through land use decisions is that the role of the federal government is still unsettled in land use policy generally and in the control of growth specifically. Patrick Moynihan has stated with great insight, "We have long had a national urban growth policy familiar under the more modest guise of the Federal Highway Program."¹⁸² In addition to the long standing grants-in-aid for planning and open space development, there is a growing dialogue that the federal government's role should actually be more extensive. The National Goals Research Staff has recommended a national growth policy described as follows:

A national growth policy will not be a single policy. Rather, it will be composed of an entire constellation of policies that collectively will shape both the directions of our society in terms

¹⁷⁹ See 16 U.S.C. 1301 *et. seq.* (1970); 7 U.S.C. 1838 (1970).

¹⁸⁰ DEL. CODE ANN. tit. 7, §§ 5901-07 (Supp. 1971).

¹⁸¹ REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *supra* note 1, at 213.

¹⁸² Quoted in an address by Dr. Richard H. Slavin entitled "Components of National and State Land Use Policy," delivered at the Meeting of the Council of State Planning Agencies, Washington, D.C., January 10-13, 1972.

of its growth and the balance among many segments of the society in terms of priorities and interrelationships.¹⁸³

The federal government has in the past made significant efforts to influence the forces affecting urbanization and economic growth, which, while not described as land use policy, often have had the same effect.¹⁸⁴ Like past efforts, many of the current land use regulation proposals pending at the federal level do not set up federal land use regulations, but attempt to induce states into increased responsibility and expertise in the land use area. We must thus look first to these federal programs which have an indirect effect on land use, and then to other proposals which attempt to seek actual land use regulation.

A. *Programs of Indirect Effect*

1. The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 clearly requires that the federal government comply with the Act prior to undertaking construction, action, or granting funds to a state or political subdivision thereof for a project that may significantly affect the environment of open space or wilderness areas.¹⁸⁵ More specifically, the Act requires that federal agen-

¹⁸³ NATIONAL GOALS RESEARCH STAFF, TOWARD BALANCED GROWTH: QUANTITY WITH QUALITY, *supra* note 22, at 160.

¹⁸⁴ The Employment Act of 1946 [15 U.S.C. §§ 1021-24 (1970)] was aimed at creating conditions under which there will exist jobs for all those able, willing, and seeking work, and at promoting maximum employment, production, and purchasing power. The goal of the National Housing Act of 1949 [Pub. L. No. 81-171, ch. 338, 63 Stat. 413 (codified in part at 12 U.S.C. §§ 1703, 1709, 1738 (1970))] is to provide a decent home and suitable living environment for every American family. The Public Works and Economic Development Act of 1965 [Pub. L. No. 89-136, 79 Stat. 552 (codified in scattered sections of 42 U.S.C. (1970))] is directed at helping areas and regions of substantial and persistent unemployment and underemployment to plan and finance public works and economic development essentially for the purpose of creating new employment opportunities. The goal of the Economic Opportunity Act of 1964 [Pub. L. No. 88-452, 78 Stat. 508 (codified in scattered sections of 42 U.S.C. (1970))] is "to eliminate the paradox of poverty in the midst of plenty in this nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity." The purpose of the Appalachian Regional Development Act of 1965 [Pub. L. No. 89-4, 79 Stat. 5 (codified in scattered sections of 40 U.S.C., 40 U.S.C. App. (1970))] is to assist this particular region "in meeting its special problems, to promote its economic development, and to establish a framework for joint Federal and State efforts toward providing the basic facilities essential to its growth and attacking its common needs on a coordinated and concerted regional basis." Finally, Title I of the Demonstration Cities and Metropolitan Development Act of 1966 [Pub. L. No. 89-754, 80 Stat. 1255 (codified in scattered sections of U.S.C. (1970))] is aimed at enabling cities to improve living conditions for their residents, including rebuilding slum areas, expanding jobs, housing, and income opportunities, establishing better access between homes and jobs, and reducing dependence on welfare payments.

¹⁸⁵ 42 U.S.C. §§ 4321 *et. seq.* See Guidelines, Council on Environmental Quality, 36 Fed. Reg. 1398-402 (1971), as modified, 36 Fed. Reg. 7724-29 (1971); see e.g., *Named Ind. Members of the San Antonio Conserv. Soc'y v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), (cert. denied (prior to judgment), 400 U.S. 968 (1970) (Black, Brennan, and Douglas, J.J. dissenting in written opinions)).

cies consider the effects upon population growth and concentration before any grants or actions they take.¹⁸⁶ The Department of Housing and Urban Development has been enjoined from making a federal grant to a private developer to construct a 16-story high-rise apartment in an urban area until preparing an environmental impact statement in compliance with NEPA, where the high-rise would change the character of a neighborhood with no high-rise apartments, would concentrate population in the area, would draw a greater concentration of population in the future, would incidentally increase automobile traffic, and would result in a loss of view to some neighborhood lots.¹⁸⁷ Such potentialities were held to be significant cumulative effects on the human environment: an environment which section 102 of NEPA¹⁸⁸ mandates must be studied and considered first.

2. Congressional Encouragement of Open Space

While the National Environmental Policy Act insures that federal grants to state and local governments be conditioned upon the requirement of consideration for protecting open space and controlling growth, Congress has also sought to encourage states to preserve open space and wilderness areas. Congress passed the Land and Water Conservation Fund Act of 1965,¹⁸⁹ establishing a fund to provide federal financial assistance to the states for planning, acquisition, and development of needed land and water areas and facilities for outdoor recreation. Congress has authorized the Secretary of Housing and Urban Development to make grants to states and political subdivisions to acquire and develop parks and open space.¹⁹⁰ Five hundred and sixty million dollars has been authorized for this program. Recipients of grants under this program need approval of the Secretary prior to changing the use of parks and open space acquired. Approval is conditioned upon the substitution of equivalent parkland or open space to replace the areas diverted for other uses.

3. Congressional Encouragement to Protect Estuarine Areas

Congress has sought to encourage the states to protect estuarine areas. The Secretary of the Interior has been authorized to make an inventory of the nation's estuaries, coastal

¹⁸⁶ NEPA § 101(b)(5), 42 U.S.C. § 4331(b)(5) (1970); S. Rep. No. 296, 91st Cong., 1st Sess. 17, 19 (1969).

¹⁸⁷ *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

¹⁸⁸ 42 U.S.C. § 4332 (1970).

¹⁸⁹ 16 U.S.C. §§ 4601-4 to -11 (1970).

¹⁹⁰ 42 U.S.C. §§ 1500a-d (1970).

marshlands, bays, sounds, seaward areas, lagoons, and land and waters of the Great Lakes, and to determine whether such areas should be acquired by the Secretary of the Interior for the federal government, by a state or by political subdivisions thereof, or whether such areas can be protected adequately by local, state, and federal laws.¹⁹¹ The Secretary of the Interior has also been authorized to study the feasibility of establishing a nationwide system of estuarine areas, and has been given the authority to enter into agreements with states, or political subdivisions or agencies of a state, to provide for permanent management, development, and administration of any estuarine area owned or acquired after the agreement is entered into.¹⁹² In approving funds to states under the Land and Water Conservation Fund Act of 1965 or under several fish and wildlife conservation statutes, the Secretary of the Interior is required to establish such terms and conditions as he deems necessary to insure the permanent protection of estuarine areas, including a provision that the lands or interests therein shall not be disposed of by sale, lease, donation, or exchange without prior approval.¹⁹³

Several bills before the 92d Congress would provide further federal aid and encouragement to the states to protect estuarine areas.¹⁹⁴ A proposed Coastal and Estuarine Area Management Act¹⁹⁵ would authorize the Administrator of the National Oceanic and Atmospheric Agency to make grants to any state coastal authority to defray the authority's operation expenses incurred in long range planning with respect to coastal and estuarine area management and the implementation of those plans. The Administrator would have to approve grants for such long range planning or for the implementation of these plans if the coastal authority complied with statutory requirements. In order for the Administrator to approve a grant, the proposal of a coastal authority would have to fulfill the objectives of the Act, taking into consideration a number of factors, including the degree to which the proposal:

¹⁹¹ 16 U.S.C. §§ 1221-26 (1970).

¹⁹² *Id.* §§ 1222(c), 1223.

¹⁹³ *Id.* § 1225.

¹⁹⁴ H.R. 14146, 92d Cong., 2d Sess. (1972); H.R. 9229, 92d Cong., 1st Sess. (1972); H.R. 2493, 92d Cong., 1st Sess. (1971); H.R. 2492, 92d Cong., 1st Sess. (1971); S. 3507, 92d Cong., 2d Sess. (1972); S. 582, 92d Cong., 1st Sess. (1971); The Senate passed S. 3507 in an amended form on Apr. 25, 1972, to assist states to establish coastal zone estuarine management programs. See 3 ENVIR. REP. 1563 (Apr. 28, 1972). On Aug. 2, 1972, by a 376-6 vote the House passed and sent to conference H.R. Res. 14146, 92d Cong., 2d Sess. (1972), the Federal Coastal Zone Management Bill. 3 ENVIR. REP. (Current Developments) 403 (Aug. 4, 1972).

¹⁹⁵ H.R. 2492, 92d Cong., 1st Sess. (1971).

- (1) identifies the coastal areas requiring concentrated attention, and develops a plan for their most effective utilization,
- (2) provides machinery for the resolution of conflicts arising from multiple use,
- (3) fosters the widest possible variety of beneficial uses to maximize social return, achieving a balance between the need for conservation and for economic development,
- (4) provides for necessary enforcement powers through zoning, permits, licenses, easements, acquisition, or other means to assure compliance with plans and resolve conflicts in uses,
- (5) fosters coordination with local, State and Federal agencies, research institutions, private organizations, and other groups as appropriate to provide a focus for effective management . . .¹⁹⁶

The size of grants to individual states would depend upon the population of the state, the size of their coastal or estuarine area, and the financial need of the state.

Another proposed coastal and estuarine act¹⁹⁷ would similarly provide for federal grants to states to encourage them to protect estuarine and coastal areas. This bill would authorize the Secretary of Commerce to make grants to coastal states to assist them in developing and administering a management plan and program to achieve a wise use of the land and water resources of the state's coastal and estuarine areas. The Secretary of Commerce would be authorized to underwrite, by guarantee, bond issues or loans to the states for the purposes of land acquisition, land and water development, and restoration projects in coastal and estuarine areas, as well as to make grants to states to establish estuarine sanctuaries to be used for research with respect to natural and human processes occurring within coastal and estuarine areas. A Senate version of the bill would also authorize coastal states to review all public and private development plans, projects, or regulations for conformance to the state plan and program.¹⁹⁸ The Senate version requires federal agencies which engage in or support projects in any state's coastal or estuarine area to attempt to follow the state management program in conducting their activities. This bill also has a provision similar to section 21 of the Water Quality Improvement Act of 1970,¹⁹⁹ requiring applicants for federal licenses or permits—as a prerequisite to issuance of the license or permit—to obtain a certification from the state that the proposed activity complies with the state coastal plan. State and local governments submitting applications for federal

¹⁹⁶ *Id.* at 3, 4.

¹⁹⁷ H.R. 2493, 92d Cong., 1st Sess. (1971).

¹⁹⁸ S. 582, 92d Cong., 1st Sess. (1971).

¹⁹⁹ 33 U.S.C. § 1171 (1970).

grants would have to include a statement by the appropriate state agency that the applicant's proposed project is consistent with the state's coastal plan.

These proposals have been praised for providing methods of reconciling differences among local, state, and federal value systems with respect to coastal and estuarine areas, for encouraging the multiple use philosophy with respect to coastal and estuarine areas—a management philosophy that has become accepted for the management of federal lands—and for providing federal financial assistance to the states. They also provide federal coordination of state programs, and engage the federal government in establishing management standards for coastal and estuarine areas which protect the national interest in the natural resources in such areas. One criticism that can be leveled at these proposals is that they fail to coordinate coastal and estuarine management with management of the other land and natural resources of the state. Maximum public benefits through environmental protection of open space, wilderness, coastal and estuarine areas may best be achieved through regional, multi-state land use management, or statewide land use management, which coordinates all land use and development with the needs of the highly mobile population of the area. Regional or statewide land use management programs which regulate both coastal and inland areas would allow coastal and estuarine management and protection to be considered in conjunction with regional or statewide recreational and economic needs.

4. Urban Growth and the New Communities Act

The federal government has recently dramatically increased its role in formulating growth policies. In the Urban Growth and New Communities Act of 1971,²⁰⁰ Congress made the following finding:

The rapid growth of urban population and uneven expansion of urban development in the United States, together with a decline in farm population, slower growth in rural areas, and migration to the cities has created an imbalance between the nation's needs and resources and seriously threatens our physical environment.²⁰¹

This Act establishes a scheme for development of new communities²⁰² which allows the Department of Housing and Urban Development to guarantee bonds, debentures, and other obli-

²⁰⁰ 42 U.S.C. § 4501 *et. seq.* (1970).

²⁰¹ *Id.* § 4502.

²⁰² *Id.* § 4511.

gations of public and private developers of new communities, sets up advantageous loan terms for new communities, and authorizes outright grants to developers of new public communities.²⁰³ At the end of 1971 private developers had approval and federal help in initiating seven new communities.²⁰⁴

B. *The Federal Role in Transportation Systems*

Another indirect effect with profound impact upon population stabilization and dispersion is the role the federal government plays in our nation's transportation systems. Regardless of which level of government exercises control in this field, the entire area of transportation policy is a direct factor in population maldistribution. Industrial location is influenced by the cost of transporting natural resources and raw goods used in industrial and manufacturing processes to the processing or manufacturing plant, and by the cost of transporting manufactured or processed goods to consumer markets. Industrial location and population density are influenced by the transportation systems which are available for workers to travel to their place of employment.

The highways have become a significant transportation system for delivery of raw goods to industry and finished goods to consumer markets, and for workers to travel to their places of employment. Railroads are increasingly relying upon the transport of goods, while discouraging commuter and passenger travel. Air travel is increasingly used for the transport of raw goods and finished products, but is too expensive for most workers to travel significant distances between their home and place of work. Inexpensive air travel would do much to encourage distribution of population, by making it possible for workers to live great distances from their places of employment, but because of high prices, it is not a realistic mass transportation system at present. Urban mass transportation systems by subway, train, or monorail are possible alternatives to bus or car travel as commuter transportation systems, but have not been adequately financed because, heretofore, the federal automotive dollar has been expended in new highway construction, as set out below. It is apparent that transportation systems can play a large role in growth regulation and population dispersal.

That role would require more flexibility than exists in the present system. The construction of federal aid secondary, pri-

²⁰³ *Id.* § 4516. See also 42 U.S.C. § 1492(c) (1970), which gives a priority to smaller municipalities in the purchasing of municipal securities and obligations.

²⁰⁴ REPORT ON NATIONAL GROWTH, *supra* note 93, at 60.

mary, and interstate highways — which constitute the major highways in this country — are financed by the Highway Trust Fund, established in 1956.²⁰⁵ This fund, from which Congress votes package appropriation for all federal aid highways every year or two,²⁰⁶ is collected from gasoline and auto excise taxes. Though Congress has had to provide funds in addition to the funds in the Highway Trust Fund in order to fully finance the federal aid highway program, the trust fund remains the major source of financing the federal aid highway system. The Highway Trust Fund can be used to finance only the construction of highways;²⁰⁷ consequently, as more people buy automobiles and pay increasing amounts of federal excise and gasoline taxes, more and more highways are built, while other types of urban mass transportation — commuter railroads, monorails, and subways — are neglected because of lack of financing.

The result is that major highways have penetrated many urban areas, furthered urban sprawl, threatened parks and historic areas, and forced residents to relocate. Some members of Congress have attempted to allow the use of the Highway Trust Fund for financing types of transportation other than highways, but so far have been unsuccessful.²⁰⁸ Apparently, it is not widely understood that major highways have a significant effect on growth and population density. Industry often locates adjacent to major highways, because such highways are important trucking routes and routes for employees to travel. In turn, commuter suburbs grow up along these highways, because commuters can use them as routes to jobs in urban areas.

These factors require that less reliance be placed upon the highway and automobile as a commuter and freight transportation system and more understanding be given to their role in population distribution problems and to the possible alternative methods of commuter and freight transportation. The Highway Trust Fund should be used to finance alternative types of commuter transportation systems, though this will require overcoming the strong opposition of gasoline companies, automobile manufacturers, the construction industry, the trucking industry,

²⁰⁵ Act of June 29, 1956, § 209, ch. 462, tit. II, 70 Stat. 397, as amended, 23 U.S.C. § 120 note (1970).

²⁰⁶ 23 U.S.C. § 104(b) (1970).

²⁰⁷ *Id.* § 101(d).

²⁰⁸ See Note, *The Highway Trust Fund: Road to Anti-Pollution*, 20 CATHOLIC U.L. REV. 171 (1971). See also HOLCRAFT, *THE ROAD TO RUIN* (1968); LEAVITT, *SUPERHIGHWAY — SUPERHOAX* (1970); Symposium, *The Impact of the Highway on the Urban Environment*, 20 CATHOLIC U.L. REV. 1 (1971).

motel owners, and other business interests dependent upon heavy automobile use.

Congress has begun to attempt to coordinate highway construction with construction of other types of transportation systems. The Secretary of Transportation has been directed not to approve federal funds for highway projects in urban areas of over 50,000 population unless plans for such projects have been based upon a continuing comprehensive transportation planning process carried on cooperatively by states and local communities.²⁰⁹ Long range highway plans must be coordinated with plans for transportation and be formulated with due consideration of their probable effect on future development of urban areas of more than 50,000 population. Federal grants to planning bodies may be conditioned upon federal assistance in developing coordinated transportation planning, including highway planning. The statutory scheme is keyed to the needs of contiguous interstate critical transportation regions or transportation corridors where the "movement of persons and goods between principal metropolitan areas, cities, and industrial centers has reached, or is expected to reach, a critical volume in relation to the capacity of existing and planned transportation systems to efficiently accommodate present transportation demands and future growth."²¹⁰ Only \$500,000, however, has been authorized for such grants—a wholly inadequate amount to finance sophisticated coordinated transportation planning.

In addition, our highway transportation policy can be used to limit growth, prevent concentrated industrial location and industrial development, and to decentralize our population by dispersing our people geographically. Even the American Trucking Association has urged that our highway transportation policy should promote a population dispersal program.²¹¹ The Association urges highway transportation which "can facilitate the flow of both goods and people that would support a program to achieve better balance of our population and our resources."²¹² The Federal Aid Highway Act of 1970 authorizes expenditure of \$100 million over the next 2 fiscal years.

[This is] to demonstrate the role that highways can play to promote the desirable development of the Nation's natural resources, to revitalize and diversify the economy of rural areas and smaller communities, to enhance and disperse industrial growth, to en-

²⁰⁹ 23 U.S.C. § 134 (1970).

²¹⁰ *Id.*

²¹¹ *The Geography of Survival* (advertisement of the American Trucking Ass'n), *HARPER'S MAGAZINE*, Oct. 1971, at 40-41.

²¹² *Id.* at 41.

courage more balanced population patterns, to check and, where possible, to reverse current migratory trends from rural areas and smaller communities, and to improve living conditions and the quality of the environment"²¹³

The Act authorizes the Secretary of Transportation to make grants to states for demonstration projects for the construction, reconstruction, and improvement of development highways, federal aid primary system highways which provide appropriate access to economic growth centers (urban areas which are geographically and economically capable of contributing significantly to the development of the area and have a population of under 100,000). The purpose of such demonstration projects is spelled out.

[It is] to serve and promote the development of economic growth centers and surrounding areas, encourage the location of business and industry in rural areas, facilitate the mobility of labor in sparsely populated areas, and provide rural citizens with improved highways to such public and private services as health care, recreation, employment, education, and cultural activities, or otherwise encourage the social and economic development of rural communities, and for planning, surveys and investigations in connection therewith.²¹⁴

Implementation of this philosophy to future construction of all federal aid highways would assure that highways are constructed with due regard for population dispersal and control of growth.

C. *Direct Land Use Regulation*

A number of bills designed to provide federal aid and encouragement to the states to undertake comprehensive and coordinated statewide land use programs have been introduced into the 92d Congress,²¹⁵ following introduction by Senator Jackson of a proposed National Land Use Policy Act to the second session of the 91st Congress.²¹⁶ These bills generally provide for federal grants to the states and to interstate agencies for

²¹³ 23 U.S.C. § 143(a) (1970).

²¹⁴ *Id.*

²¹⁵ H.R. 8119, 92d Cong., 1st Sess. (1971); H.R. 7804, 92d Cong., 1st Sess. (1971); H.R. 6579, 92d Cong., 1st Sess. (1971); H.R. 5504, 92d Cong., 1st Sess. (1971); H.R. 4703, 92d Cong., 1st Sess. (1971); H.R. 4569, 92d Cong., 1st Sess. (1971); H.R. 4332, 92d Cong., 1st Sess. (1971); H.R. 2449, 92d Cong., 1st Sess. (1971); H.R. 2173, 92d Cong., 1st Sess. (1971); S. 2554, 92d Cong., 1st Sess. (1971); S. 992, 92d Cong., 1st Sess. (1971); S. 632, 92d Cong., 1st Sess. (1971). The House Interior Committee has approved H.R. 7211, 92d Cong., 2d Sess. (1972), providing for land use planning grants to states, see 3 ENVIR. REP. 188 (June 16, 1972); 3 ENVIR. REP. 39 (May 12, 1972), which incorporates H.R. 4332. The Senate Interior and Insular Affairs Committee has passed a compromise between Senator Jackson's S. 632 and the administration's S. 992. See 3 ENVIR. REP. 150 (June 9, 1972).

²¹⁶ S. 3354, 91st Cong., 2d Sess. (1970); 116 CONG. REC. 1757 (1970).

planning, management, and administration of the states' land resources through the development and implementation of comprehensive statewide land use plans. These plans would be based upon national goals and values established by the federal government in conjunction with state and local governments. The plans are designed to achieve an ecologically and environmentally sound use of the nation's land resources and to protect wilderness and open space. Such statutes would avoid the conflicts and degradation of open space and wilderness that often occur when federal, state, and local governmental agencies collide in the pursuit of separate goals and objectives.²¹⁷ These bills would resolve the conflicts between various federal administrative agencies involved in public land management and the conflicts between various statutes regulating the public lands—goals of the Public Land Law Review Commission Act.²¹⁸ Some of these bills provide that federal grants to states under other statutory programs—such as federal aid for highways—be lowered if the states fail to prepare a statewide land use program which is approved by the federal government as in compliance with the goals and purposes of the bill. These bills are based on the power of the federal government to regulate the use of private land in order to protect public lands²¹⁹ and the power of Congress to condition federal grants to states upon compliance with other federal statutes.²²⁰ Most of these bills also provide that federal administrative agencies must conduct their activities so as to comply with approved state land use plans.

On February 8, 1971, President Nixon suggested to Congress in a special message on the state of the environment that federal subsidies be granted to encourage the states to recapture from local zoning authorities some of their tenth amendment rights on land use regulation.²²¹ Unlike Senator Jackson's previous efforts—which would have exempted cities of 250,000 or more and cities which accounted for 20 percent or more of their state's population—the President's proposal contained no exemptions. It would require states to guarantee *at the state level* certain important state controls such as:

- A method for state control over location of all focal points of

²¹⁷ *Id.* at 1758-59.

²¹⁸ 43 U.S.C. §§ 1391-1400 (1970).

²¹⁹ *United States v. Alford*, 274 U.S. 264, 267 (1927).

²²⁰ See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

²²¹ First Annual Report on the State of the Nation's Environment, 117 Cong. Rec. H. 505, S. 948 (daily ed., Feb. 8, 1971), (H.R. Doc. No. 92-46, 92d Cong., 1st Sess. (1971)).

growth, such as highway interchanges, major airports, and major recreational centers such as Disneyland.

- A method for state control over the location of all new communities.
- A method for state control over all large-scale developments of property.
- A method for state control over local attempts to block property developments of regional benefit. Such properties might be schools, hospitals, community centers, or multi-dwelling residential settlements capable of providing good housing for the poor.
- A method to ensure state protection of existing property identified as being of "critical environmental concern." Such property includes coastal zones and estuaries; lakes, rivers, and smaller streams and their flood plains; homes of important ecosystems; and areas embodying historical, cultural, or esthetic values beyond the ordinary. "Critical" in this context can also mean hazardous and hence closed to unrestricted development.²²²

The President proposed that all federal aid expenditures affecting land use must be designed or redesigned to conform with the state's land development plans. His proposal did not cover directly the siting of electric power generating stations, which can be another major force in population distribution, but he has advocated a separate siting law which would require a single state agency to make certification and environmental decisions relating to electrical production.²²³

Another method of protection of unique and valuable land resources that has been suggested is a national land use commission which would regulate the commercial and industrial development of open space land and the preservation of open space by determining the use to which private lands could be put, with payment of just compensation to private landowners where land use restrictions imposed by the commission create a taking of property without just compensation.²²⁴ The constitutionality of this program might be suspect, however, since it could be found to exceed the power of the federal government to regulate private lands in protecting public lands, and as invading the province of the state's police power.

D. *The Distribution of the Federal Dollar*

The control and redirection of growth can be greatly affected by the federal government's ability to influence the location of economic activity. Some of the opportunities available in this area have been explored by the prestigious Advisory Commission on Intergovernmental Relations. The Commission

²²² Lear, *Land: Making Room for Tomorrow*, SATURDAY REVIEW, March 6, 1971, at 46.

²²³ *Id.*

²²⁴ McCloskey, *supra* note 163.

recommended consideration of the following programs as "useful approaches to the implementation of a national policy regarding urban growth:"

- Federal financial incentives, such as tax, loan, or direct payment arrangements for business and industrial location in certain areas;
- placement of Federal procurement contracts and construction projects to foster urban growth in certain areas;
- Federal policies and programs to influence the mobility of people, to neutralize factors producing continued excessive population concentrations, and to encourage alternative location choices; such policies and programs might include, among others, resettlement allowances, augmented on-the-job training allowances, interarea job placement and information on a computerized basis, and the elimination or reduction in the "migrational pull" of interstate variations in public assistance eligibility and benefit standards;
- strengthening the existing voluntary Federal-State programs of family planning information for low-income persons;
- Federal involvement and assistance under certain conditions (such as assurances of an adequate range of housing) for large-scale urban and new community development.²²⁵

Much of the current federal spending pattern is an unequal distribution of federal dollars which adds to the forces causing deterioration of rural America, which, in turn, causes further concentrations in urban America.²²⁶ Rural communities do not receive their share of federal spending. Nonmetropolitan citizens get 17 percent less per capita in federal outlays than do metropolitan area citizens.²²⁷ Fifty-seven percent of the federal outlays in fiscal 1970 went to the most urban counties while 3.3 percent went to sparsely settled rural areas with no urban population.²²⁸ Clearly, rural America is both separate and unequal.

The Second Session of the 92d Congress has reported out of Conference Committee Title I of the Rural Development Act of 1972²²⁹ which is directed at this problem and which seeks to

²²⁵ ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CONCLUSIONS AND RECOMMENDATIONS FROM URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH (excerpt from Report A-32) 25 (1968).

²²⁶ "Following the riots in Detroit a few years ago, the business community of that city formed an organization that created 50,000 new jobs for the poor. It was an enormous community effort. And when it was done, Detroit learned that its unemployment rate was *slightly higher* than it had been before the jobs had been created. The word had gone out on the migration grapevine that there were jobs in Detroit for rural people who wanted to work." S. Rep. No. 92-734, 92d Cong., 2d Sess. 5 (1972). (Emphasis added).

²²⁷ *Id.* at 9.

²²⁸ *Id.*

²²⁹ 3 ENVIR. REP. (Current Developments) 481 (Aug. 25, 1972). The Senate approved and sent to the White House on Aug. 17, 1972 H.R. Conf. Comm. Rep. No. 92-12931, 92d Cong., 2d Sess. (1972) on the Rural Development Act.

set up an entirely new rural development banking system. It allows interest subsidies to private businesses which obtain loans from the system and are unable to repay at the market rate of interest, such interest subsidy being available only to firms locating in areas which have a net loss of population.

The choice of alternatives such as those that are available on the federal level is vast. Federal purchasing policy provides a significant stimulus to the growth and development of certain areas. Yet recent studies have shown an extremely uneven geographic distribution of federal contracts to the wealthier and more highly urbanized states.²³⁰ Various bills have been introduced to give credit on bids received from cities under 250,000 population, proportionately greater credits for smaller cities, and a separate credit of 2 percent for any area where unemployment or underemployment exceeds the national average or for areas of serious emigration.²³¹ The goal of one such bill was clear:

[It was to] develop business and employment in smaller cities and areas of underemployment and unemployment, to assist in bringing excess farm labor and other unemployed and underemployed labor into a new productive relation to society and yet to enable such people to remain in less densely populated areas, and not be forced to migrate to our overcrowded cities.²³²

Decisions regarding location of federal (and state) facilities such as government office centers, research complexes, military installations, and public works projects can further be used to direct growth to areas which need the growth, and away from areas where growth is excessive.

CONCLUSION

The search today is for an effective and politically realistic balance between local, state, and federal land use decisionmaking. The task is complicated by both its intrinsic problems and the burden of overcoming years of "local control" which, in fact, did serve the needs of the time. But current needs are already different and changing rapidly. Massive population shifts, increased population pressures on finite land resources, large scale transportation systems which have large scale effects on land use patterns, the increased size, scope, and impact of many private actions, and the proven inability of fragmented local decisionmaking to adequately weigh and balance all neces-

²³⁰ ADVISORY COMMISSION CONCLUSIONS AND RECOMMENDATIONS, *supra* note 225, at 33.

²³¹ See, e.g., H.R. 12802, 90th Cong., 1st Sess. (1967).

²³² 113 CONG. REC. 28186, 28187 (1967) (remarks of Representative Morris).

sary considerations all mandate a total overhaul of our land use decisionmaking process.

Part of the solution may lie in requiring certain categories of decisions to be made at a regional or state level. To accept this choice means that we must recognize the failures and inadequacies of the existing system. Growth policies are all but nonexistent on both the national and state levels. Decisions concerning land use, water use, and growth are made by innumerable, scattered, and uncoordinated local officials seeking "additional tax base." Land speculators purchase land on the outskirts of every large city and in prime recreational areas and then apply economic pressure to reinforce the already compelling forces that bring about urbanization and environmental destruction. More importantly, the sprawl, maldistribution, and environmental deterioration are caused by impotent regulation. We have assumed that the laissez-faire attitude toward land development served the highest public good. Adam Smith's theories were applied to land management and it has always been felt that each community seeking its own self-interest (or what it thought to be its self-interest) served the public good. We are finding today that that assumption is as untenable on the community level as it was on the individual level. One community seeking short term economic growth can seriously harm scarce natural resources, perpetuate urban sprawl, or completely negate statewide plans and goals.

The situation can be remedied by the development of new decisionmaking levels and the use of new or existing legal tools. The states must reclaim some of their previously delegated tenth amendment rights to manage the land within their boundaries. Each state must recognize that many of the decisions of the 1970's will have impact far beyond any one city's limits. Local zoning alone is insufficient to solve multi-jurisdictional problems. Local zoning must be guided by—or at the least, not be inconsistent with—state and regional land use policies. The state land use policies themselves should be responsive to, and coordinated with, state growth policies. In turn, each state's growth policy should seek a fit within the federal scheme. Pending federal legislation offers states the opportunity to synchronize their land use decisionmaking process, examine the underlying policies, and adapt their intergovernmental structures toward effective land use planning. It is likely to be the most important opportunity of the 1970's.

